





THE
LAW OF COSTS
IN NEW YORK

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PREFACE.

This work has been prepared for the practising attorney in the state of New York, and presupposes that he is acquainted with the substantive law of costs, the different courts, their jurisdiction and procedure. The writer has endeavored to show the application of the general rule of costs to specific cases. Therefore the general rule upon the subject under consideration has been stated; then the specific instances of the application of that rule follow. The procedure for obtaining such costs is then given, stating also how the allowance thereof is reviewed on the ground that they are excessive or unauthorized.

The subject-matter of each chapter has been subdivided so that the reader may readily find where the subject under consideration is treated. The index also has been prepared with especial reference to pointing out where specific questions are discussed.

The statute authorizing the granting of costs in each particular instance is given, and all of the reported cases upon that subject are cited. It has seemed best to omit none, although the point has been definitely decided by the appellate court, because the difference in the facts of the several cases serves to distinguish them, and it is often of great advantage to have a case in which the facts are identical with the one under consideration.

Strictly speaking, allowances granted by the courts to pay for the services of counsel are not costs; yet the distinction is one of words, rather than substance. Therefore they have been treated as though they were denominated costs in the Code of Civil Procedure.

The forms are intended to show the practitioner just where to find the law authorizing every item of cost or disbursement, and to suggest to him all the items to which the taxing party is entitled.

The question of the title to costs is only one branch of the subject of the lien of an attorney. It has seemed best, therefore, to treat the entire subject of attorney's lien, including methods of enforcement.

Upon disputed and unsettled points the aim has been to present the position which has been considered the more tenable, noting in the citations the cases which hold contrary to the text. No attempt has been made to discuss decisions that are contradictory beyond the hope of reconciliation. Where, however, the disagreement is one of words, and not of substance, an effort has been made to show the principles which underlie all the decisions, although the courts have not clearly recognized them.

No book upon this subject would be complete without a warning against relying upon any case for or against any proposition until the statute under which the reported case arose is compared with the existing statute. The assumption that the law has not changed, or reliance upon the statement by the court that the statutes are the same, is always fraught with danger. The careful practitioner will always compare the statutes, even at the expense of great labor and time.

GEORGE E. MILLIMAN.

ROCHESTER, N. Y., January 1, 1904.

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THE LAW OF COSTS IN NEW YORK.

CHAPTER I.

GENERALLY.

1. Definition of costs.
2. Costs at common law.
3. Costs in actions at law.
4. Costs in actions in equity.
5. By what statute governed.
6. Costs determined by which verdict.
7. Power of the court over costs.
 - a. In actions at law.
 - b. In actions in equity.
8. Power of attorneys over costs.

1. Definition of costs.— Costs are compensation for the expense incurred or paid out by a party in the prosecution of an action or special proceeding.¹ They are not a punishment of the party who has to pay them, nor a bonus to the party who recovers them. They were formerly given to a party for the expense he was put to in paying fees of officers of the court, among which were those of his attorney. These fees had to be taxed and settled by the proper officer of the court before the attorney could recover them of his client.

2. Costs at common law.— At common law there were no costs to either party, but a practice grew up in the courts of allowing the plaintiff compensation for the expense he had been put to in carrying on his suit, and of assessing it as a part of the damages, so as to include it in the recovery. When the judges went upon circuits and had not the necessary time to assess costs, the statute of Gloucester (6 Edw. I. chap. 1) was passed, which allowed the plaintiff to recover costs where he recovered damages. By sub-

¹*Ferguson v. Arnoir*, 142 N. Y. 580,
60 N. Y. S. R. 301, 37 N. E. 626.

sequent statutes (Marlbridge, chap. 6; 23 Hen. VIII., chap. 15) the defendant, if the plaintiff was defeated, was allowed to recover costs, to be assessed in the discretion of the judge or judges of the court.

3. Costs in actions at law.—The Code abolished the fee bill leaving the attorney's compensation to the agreement of the parties, express or implied, and allowed the prevailing party to recover fixed sums as costs. Where a party, not an attorney, conducted a suit or defense in person, he was not entitled to costs under the old fee bill, which made provision only for the services enumerated therein when rendered by officers of the court;² nor will he be allowed costs under the Code of Civil Procedure,³ but he will be allowed his necessary disbursements.⁴

An attorney must appear formally or in point of fact in a cause, or he will not be recognized as an attorney for the purpose of obtaining costs. He must subject himself to the responsibilities of that character, or he cannot claim its advantages. It is not sufficient that the work has been wholly or partly done by an attorney.⁵

Where an attorney is a party to a suit, and conducts the case in person, he is entitled to costs the same as though he had employed another attorney to conduct the case for him.⁶

The right to costs is not an inherent right, but is created by statute, and can only be obtained by bringing one's self clearly within the operation of existing statutory provisions.⁷

²*Stewart v. New York Common Pleas*, 10 Wend. 597; *Verplank v. Mercantile Ins. Co.* 1 Edw. Ch. 46. ³*Re Grade Crossing*, 20 App. Div. 271, 46 N. Y. Supp. 1070; *Munson v. Curtis*, 43 Hun. 214, 26 N. Y. Week.

⁴*Chanard v. Fuller*, 4 Month. L. Bull. 20. ⁵Dig. 236, 6 N. Y. S. R. 189; *Patterson v. Burnett*, 1 Silv. Sup. Ct. 166.

⁶*People ex rel. White v. Steuben Common Pleas*, 12 Wend. 200. ⁷17 N. Y. Civ. Proc. Rep. 116, 4 N. Y. Supp. 921, 23 N. Y. S. R. 363; *Re Brooklyn*, 148 N. Y. 107, 42 N. E.

⁵*People ex rel. White v. Steuben Common Pleas*, 12 Wend. 200. ⁴413; *Lercne v. Hahner*, 62 App. Div. 195, 70 N. Y. Supp. 913; *Krafft v. Crommelin v. Dinsmore*, 1 N. Y. City

⁶*Kopper v. Willis*, 9 Daly. 460; ⁷Wilson, 8 N. Y. Civ. Proc. Rep. 359, Ct. Rep. 69. ³3 How. Pr. N. S. 18; *Onondaga v*

When the amount of costs is limited by law, this includes costs and disbursements. A party cannot tax costs to the limit allowed by law, and then add disbursements.⁸

4. Costs in actions in equity.—There are two distinct lines of opinions on the question whether the right to costs in equity actions depends upon the inherent powers of an equity court, or depends upon statutory authority, as in actions at law. In the first class it has been decided that costs in equity actions do not depend upon any statute, but are allowed by reason of the inherent powers of the court.⁹

In the other class of cases it has been held that a court of equity has no inherent power to award costs independent of statutory authority.¹⁰ In this class of cases the courts hold that as the common-law courts first derived their authority from the Statute of Gloucester, so the equity courts first derived their authority to allow damages (costs) from 17 Rich. II., chap. 6, which authorized the chancellor to allow damages (costs) according to his discretion to him who was troubled unduly.

5. By what statute governed.—The right to costs, and the rate of compensation, are governed by the law in force at the time the right to costs is asserted by taxation, or, where taxation is suspended by order of the court, by the law in force at the time of such order.¹¹

Briggs, 3 Denio, 173; *Clark v. Dewey*, 5 Johns. 251; *Waterman v. Van Ben-schotten*, 13 Johns. 425; *Wickham v. Seely*, 18 Wend. 649; *Croft v. Brandt*, 58 N. Y. 106, 17 Am. Rep. 213; *Equitable Life Assur. Soc. v. Hughes*, 125 N. Y. 106, 11 L. R. A. 280, 26 N. E. 1; *McKuskie v. Hendrickson*, 128 N. Y. 555, 40 N. Y. S. R. 619, 28 N. E. 650; *Kilburn v. Lowe*, 37 Hun, 237; *Ward v. James*, 8 Hun. 526; *Dowd v. Smith*, 8 Misc. 619, 29 N. Y. Supp. 821.

⁸*Wheeler v. Westgate*, 4 How. Pr. 269; *Ryan v. Farley*, 3 Month. L. Bull. 78.

⁹*Eastburn v. Kirk*, 2 Johns. Ch. 317; *Belmont v. Ponvert*, 6 Jones & S. 425, Reversed in 63 N. Y. 547. without passing on the question of costs.

¹⁰*Struthers v. Christal*, 3 Daly. 327; *Downing v. Marshall*, 37 N. Y. 380.

¹¹*Ackley v. Tarbox*, 19 Abb. Pr. 119; *Fargo v. Helmer*, 43 Hun, 17; *McMasters v. Vernon*, 1 Abb. Pr. 179, 4 Duer, 625; *Wheaton v. Newcombe*, 21 Jones & S. 178, 11 N. Y. Civ. Proc. Rep. 90; *Brooklyn Bank v. Willoughby*, 1 Sandf. 669; *Rich v. Husson*, 1 Duer, 617, 11 N. Y.

The legislature may, during the progress of an action, create an allowance for service not before provided for, or wholly abolish such allowance as existed at the time of the commencement of the action.¹² There is no vested right in costs during the pendency of an action.¹³ Where a defendant appealed from a judgment, and, six months after the appeal was taken, the law in relation to costs was amended by requiring the appellant to serve an offer within fifteen days after the appeal should be taken, and on default thereof the plaintiff would be entitled to costs if he recovered a verdict, it was held that the plaintiff was entitled to costs, although if the law had remained unchanged after the appeal had been taken the defendant would have been entitled to costs.¹⁴ The right of the legislature thus to change the rights of the parties to the costs of a pending action is undoubted. Such a law does not violate the prohibition of the United States Constitution forbidding the passage by the several states of *ex post facto* laws, or laws that impair the obligation of contracts, because *ex post facto* laws are retrospective laws in relation to criminal matters, and there is certainly no contract relation between the parties to an action in relation to costs that may thereafter be awarded in that action. It is true that the injury caused by the passage of a law granting or withholding costs in a pending action is the same as that caused by an *ex post facto* law, the difference being one of degree merely. But the same is true of the changes made in the amount of costs in a pending action, by a law passed before the right to costs become fixed. Yet nothing is more firmly established than that the legislature

Legal Obs. 119; *Onondaga v. Briggs*, 1 How. Pr. 86; *Goodenow* 3 Denio, 173; *Hunt v. Middlebrook*, 1 How. Pr. 232; *Cur-*
 14 How. Pr. 300; *People ex rel. Barry* 1 Abb. Pr. 118, 19
 v. *Herkiner Common Pleas*, 4 Wend. Barb. 530; *McCann v. Bradley*, 15
 210; *Holmes v. St. John*, 4 How. Pr. 79.

66, 2 N. Y. Code Rep. 46; *Taylor v. Gardner*, 4 How. Pr. 67, 2 N. Y. Code

Rep. 47; *Wheeler v. Westgate*, 4 How. Pr. 269; *Van Valkenburgh v. Dig.* 168.

¹²*Onondaga v. Briggs*, 3 Denio, 173.

¹³*Rich v. Hussion*, 1 Duer, 617.

¹⁴*Sheehan v. Buller*, 24 N. Y. Week.

may, pending an action, change the amount of costs to be awarded the successful party.

The courts, however, take cognizance of the fact that retroactive laws are oppressive, and they will construe all laws as prospective rather than as retroactive, unless the plain wording of the statute forbids such a construction;¹⁵ and the courts will, wherever possible, construe the law so that the right to costs will be governed by the law as it was at the commencement of the action, rather than by the law as changed pending the action.¹⁶

The rendition of a general verdict for a party does not alone entitle him to a judgment for costs. He is entitled to costs only upon the rendering of a final judgment in the action.¹⁷

Costs are taxable according to the law in force at the time of the recovery of the judgment;¹⁸ and where the judgment is entered upon the report of a referee, the costs are taxable by the law in force at the time of the report.¹⁹

The report does not become a judgment of the court upon its delivery to the successful party, but only when it is filed with the clerk, and formal judgment entered thereon.²⁰

Where judgment is entered upon failure of the defendant to answer, costs are governed by the law at the time of the taxation and entry of the judgment, and not by the law at the time

¹⁵*Dash v. Van Kleeck*, 7 Johns. M. S. R. Co. v. *Roach*, 80 N. Y. 339; 477, 5 Am. Dec. 291. *Engel v. Fischer*, 15 Abb. N. C. 72:

¹⁶*Rich v. Husson*, 1 Duer. 617; *People ex rel. Twenty-Third Street* *Baker v. Bartlett*, 9 Wend. 494, 40 R. Co. v. *New York Tax Comrs.* 95 Am. Dec. 387. N. Y. 559; *Atkin v. Pitcher*, 31 Hun,

¹⁷*Overton v. National Bank*, 3 N. 352; *Munson v. Curtis*, 43 Hun, 214. Y. S. R. 169. ²⁰*Torry v. Hadley*, 14 How. Pr.

¹⁸*Moore v. Westervelt*, 14 How. Pr. 357; *Balcom v. Terwilliger*, 42 Hun, 279, 6 Duer. 684; *Fisher v. Hunter*, 170; *Garling v. Ladd*, 27 Hun, 112, 15 How. Pr. 156; *Rich v. Husson*, 15 N. Y. Week. Dig. 5; *Lake Shore* 1 Duer, 617, 11 N. Y. Legal Obs. & M. S. R. Co. v. *Roach*, 80 N. Y. 119; *Crary v. Norwood*, 5 Abb. Pr. 339; *Engel v. Fischer*, 15 Abb. N. C. 219; *Truscott v. King*, 4 How. Pr. 72; *People ex rel. Twenty-Third Street R. Co. v. New York Tax*

¹⁹*Torry v. Hadley*, 14 How. Pr. 357; *Balcom v. Terwilliger*, 42 Hun, 279, 6 Duer. 684; *Fisher v. Hunter*, 170; *Garling v. Ladd*, 27 Hun, 112, 15 N. Y. Week. Dig. 5; *Lake Shore* & *Comrs.* 95 N. Y. 559; *Atkin v. Pitcher*, 31 Hun, 352; *Munson v. Curtis*, 43 Hun, 214, 26 N. Y. Week. Dig. 236, 6 N. Y. S. R. 189.

of the default.²¹ Where an action is determined before a change in the law, but costs are not taxed till after the new law goes into effect, costs are taxable under the new law.²²

6. Costs determined by which verdict.—Where there have been several verdicts, costs of the entire action are taxed according to the law in force at the time of the final verdict.²³ And this is so notwithstanding proceedings are stayed thereon until a case can be made and settled, and a motion made for a new trial, and before the motion is decided the law relating to costs is changed.²⁴ It has, however, been held that costs up to and including the verdict should be taxed under the new law.²⁵ Where a demurrer is interposed, and after argument and before decision of the demurrer the law is changed, costs are governed by the law at the time of the decision, and not by the law at the time of the argument.²⁶

7. Power of court over costs. *a. In actions at law.*—In actions at law, the court has no power to grant or withhold general costs, where the party brings himself clearly within the provision of some statute; and the addition of the words “with costs” or “without costs” does not change the party’s right to costs.²⁷

Motion costs, however, in actions at law and in equity, are in the discretion of the court, and they may be given or withheld as to the court shall seem best. They may be of any amount not exceeding \$10, besides necessary disbursements for printing, and referee’s fees.²⁸ Courts have discretion in awarding costs

²¹*Steward v. Lamoreaux*, 5 Abb. Pr. 14.

²²*Thompson v. Crippen*, 1 How. Pr. 233, 234, note.

²³*Jones v. Underwood*, 18 How. Pr. 532; *Jackett v. Judd*, 18 How. Pr. 385.

²⁴*Scudder v. Gori*, 28 How. Pr. 155, 18 Abb. Pr. 207, 3 Robt. 629.

²⁵*Moore v. Westervelt*, 14 How. Pr. 279, 6 Duer, 684.

²⁶*Crary v. Norwood*, 5 Abb. Pr. 219.

²⁷*Jones v. Emery*, 1 N. Y. Civ. Proc. Rep. 338; *Norton v. Fancher*, 92 Hun, 463, 72 N. Y. S. R. 434, 36 N. Y. Supp. 1032.

²⁸Code Civ. Proc. § 3252, subdiv. 4.

upon appeals in actions at law in certain cases, and also in granting additional allowances.²⁹

Costs, as a general rule, upon motions and appeals and in trials of equity actions, are refused to both parties when neither party succeeds fully, or where the question is novel, or the law unsettled.

The court has no power to order a judgment to be entered *nunc pro tunc* as of a date prior to the actual judgment, to change the amount of costs.³⁰

b. In actions in equity.—All costs in equity actions, except an action in which the complaint demands judgment for a sum of money only, are in the discretion of the court.³¹ Under subdivision 4 of § 3228 of the Code of Civil Procedure, costs are granted as a matter of right to the plaintiff if he succeeds in an action wherein the complaint demands judgment for a sum of money only. Section 3229 gives costs as a matter of right to the defendant in such an action in case he succeeds. It makes no difference whether the action be legal or equitable.³²

Whether this discretion extended to the amount of costs allowed was a disputed question until the amendment of § 3230 of the Code of Civil Procedure (chap. 181, Laws 1900). The section now reads: "Except as prescribed in the last two sections, the court may, upon the rendering of a final judgment, in its discretion, award costs to any party, in such sum, not exceeding the total amount authorized by statute, as to the court shall seem just." This seems to be decisive of the question.

Courts possess no general and arbitrary power to give to any party such an amount as they may think will compensate him for his trouble and expense in prosecuting or defending the litigation. They must be governed by the law in force on that

²⁹ See chapters XXIV. and XXX. *post*.

³¹ Code Civ. Proc. § 3228, subdiv. 4.

³² *Murtha v. Curley*, 92 N. Y. 359.

³⁰ *Moore v. Westervelt*, 14 How. Pr. 279, 6 Duer, 684.

subject at the time of the decision, with power to grant an extra allowance in certain cases.³³

8. Power of attorneys over costs.—The attorneys in an action cannot by stipulation increase the amount of costs to be taxed by the successful party.³⁴

The Code of Civil Procedure, however, allows them to stipulate in writing as to the amount to be paid a referee. Code Civ. Proc. § 3296.

³³*Atty. Gen. v. Continental L. Ins. Co.* 27 Hun, 195, 63 How. Pr. 129, Appeal Dismissed in 90 N. Y. 45.

³⁴*O'Keefe v. Shipherd*, 23 Hun, 171.

CHAPTER II.

ATTORNEY'S LIEN.

9. Kinds of liens.
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39. Lien in matrimonial actions.

9. Kinds of liens. *a. In general.*—An attorney has two different kinds of liens upon his client's property to secure the payment of his services rendered to his client,—a retaining lien and a charging lien. They both existed at common law,¹ and still exist except as modified by statute.²

The lien is based on the same principle that all other liens are based upon, *viz.*, that the party who has by his skill and industry increased in value the property of his employer, shall be protected by a lien on that property for the payment of his services.

b. Retaining lien.—A retaining lien is the right that an attorney has of retaining all the property of his client, which has come into his hands as the attorney for his client, until he is paid for all of his services.³ But where the attorney receives any property or money for a specific purpose, he must carry out the agreement made with his client when he received it. He

¹*Ward v. Syme*, 9 How. Pr. 16, 1 E. D. Smith, 598.

²*Re Hahn*, 14 N. Y. Week. Dig. 259; *Ward v. Craig*, 14 N. Y. Week.

³*Re Lazelle*, 16 Misc. 515, 40 N. Y. Supp. 343; *Ward v. Wordsworth*, 1 E. D. Smith, 598, 9 How. Pr. 16.

cannot claim a lien thereon, as he has waived his right to a lien in receiving it for a specific purpose.⁴

c. Charging lien.—A charging lien is the right that an attorney has upon his client's cause of action, claim, or counterclaim for security for the payment for his services in that action or proceeding. This lien existed at common law,⁵ but is now governed by § 66 of the Code of Civil Procedure. The lien exists not only to the extent of the costs entered in the judgment, but also for any sum which the client has agreed that his attorney should have as a compensation for his services.⁶

Until a judgment is collected, the attorney has only a charging lien thereon, that is, for his services in that action or proceeding;⁷ but if the attorney collects the judgment, he has a retaining lien upon the proceeds, the same as upon any other of his client's property that may come into his possession as his attorney, and the attorney may retain the proceeds of the judgment until all his claims are paid.⁸ Money paid to a receiver of the client is not constructively in the hands of the attorney, and therefore cannot be made subject to a general lien.⁹ A firm of attorneys cannot retain any money upon a judgment collected by them to satisfy the claim of a member of the firm for services rendered by him before the formation of the firm.¹⁰

10. Who entitled to a lien.—Only the attorney of record is entitled to a lien. Counsel employed to assist the attorney have no lien.¹¹ Where counsel are employed by the attorney of record,

⁴*Re Larner*, 20 N. Y. Week. Dig. 545; *Re Knapp*, 85 N. Y. 284; *Krone v. Klotz*, 3 App. Div. 587. 38 N. Y.

⁵*Rooney v. Second Ave. R. Co.* 18 N. Y. 368. Supp. 225; *Re H. A.* 87 N. Y. 521; *Ward v. Craig*, 87 N. Y. 550; *Re*

⁶*Marshall v. Meech*, 51 N. Y. 140. *Lorillard*, 25 N. Y. Week. Dig. 469. 10 Am. Rep. 572. ⁹*Anderson v. E. de Braekeleer & Co.*

⁷*Williams v. Ingersoll*, 89 N. Y. 25 Misc. 343. 28 N. Y. Civ. Proc. Rep. 508; *Phillips v. Stagg*, 2 Edw. Ch. 306, 55 N. Y. Supp. 721.

108; *St. John v. Diefendorf*, 12 ¹⁰*Bowling Green Sav. Bank v. Wend.* 261; *Adams v. Fox*, 40 Barb. *Todd*, 52 N. Y. 489.

442; *Re Wilson*, 2 N. Y. Civ. Proc. ¹¹*Kennedy v. Carrick*, 18 Misc. 38. Rep. (Browne) 343. 40 N. Y. Supp. 1127; *Dailey v. Well-*

⁸*St. John v. Diefendorf*, 12 Wend. *brock*, 65 App. Div. 523. 72 N. Y. 261; *Lorillard v. Barnard*, 42 Hun,

under an agreement with the attorney and his client that they are to share with the attorney in his contingent fee, and the attorney loses his lien through negligence, the right of counsel to a lien on the judgment falls with that of the attorney.¹² Where several attorneys have been employed in a case by a municipal corporation, and the charter provides that the costs shall belong to the city attorney, each attorney will be entitled to the costs that were earned while he was the attorney of record.¹³ An attorney who brings an action without authority is not entitled to any compensation, and therefore has no lien which the court can protect.¹⁴ A person who has made an agreement with an attorney to procure claims for the attorney to collect cannot compel the attorney to pay his share of the compensation received by the attorney either by action,¹⁵ or by summary proceedings.¹⁶ Where judgments are attached, the client cannot raise the question that his attorney has a lien thereon for his services, though the judgments are for costs. Such judgments are the property of the client till the attorney asserts his lien.¹⁷

11. In what courts.—A lien can be acquired only in courts of record. Section 66 of the Code of Civil Procedure does not apply to justices' courts,¹⁸ or a court that takes its place, such as the municipal court of the city of Buffalo.¹⁹ It is a question whether there is such a thing as an attorney's lien in the municipal court of the city of New York.²⁰ Formerly a lien could not be acquired in the surrogate's courts,²¹ but since they have be-

Supp. 848; *Brown v. New York*, 9 Hun. 587. ¹⁶*Re Hirshbach*, 72 App. Div. 79, 76 N. Y. Supp. 117.

¹²*Williams v. Barkley*, 165 N. Y. 48, 58 N. E. 765. ¹⁷*Wehle v. Conner*, 83 N. Y. 231.

¹³*Lockport v. Fitts*, 39 Hun. 221. ¹⁸*Levis v. Burke*, 51 Hun. 71, 20 N. Y. S. R. 789, 3 N. Y. Supp. 386.

¹⁴*Whitesell v. New Jersey & H. River R. & Ferry Co.* 68 App. Div. 82, 74 N. Y. Supp. 217. ¹⁹*Drago v. Smith*, 92 Hun. 536, 72 N. Y. S. R. 418, 36 N. Y. Supp. 975.

²⁰*People ex rel. Jaffe v. Fitzpatrick*, 35 Misc. 456, 71 N. Y. Supp. 191.

²¹*Hirshbach v. Ketchum*, 5 App. Div. 324, 39 N. Y. Supp. 291; *Irwin v. Curie*, 56 App. Div. 514, 67 N. Y. Supp. 380. ²¹*Flint v. Van Dusen*, 26 Hun. 606.

come courts of record they can enforce the lien of the attorneys upon their decrees,²² or upon any property over which the court has jurisdiction.²³

12. Loss of lien.—If before the recovery of a final judgment the attorney refuses to proceed with the action, his inchoate right of lien is lost.²⁴ It makes no difference what his reasons are, whether he does not wish to proceed with the action, or has not been paid for his services, or his disbursements.²⁵ Where the attorney refuses to proceed with the action until he is paid for his services, he loses his lien upon the papers, and may be compelled to give them up.²⁶ Where proceedings are brought to compel the attorney to give up the papers, the proceedings should be entitled in the matter of the attorney.²⁷ He may also lose his lien by a failure to carry out a contract by which he was to have a part of the recovery.²⁸ The rule, that the release of one joint tortfeasor will release all other joint tortfeasors, applies to attorneys' liens. If the attorney releases one joint tortfeasor, he cannot retain any lien upon the claim against the other joint tortfeasor. The claim is gone and his lien falls with the claim.²⁹

An attorney can waive his lien. He does this when he does any act inconsistent with the maintenance of his lien.³⁰ He waives his lien upon specific chattels when he consents that they be delivered to the owner, making no claim for his lien.³¹ He

²²*Re Regan*, 29 Misc. 527, 7 N. Y. Pr. 413; *Fargo v. Paul*, 35 Misc. 568, Anno. Cas. 165, 61 N. Y. Supp. 1074, 72 N. Y. Supp. 21.

Affirmed in 167 N. Y. 338, 60 N. E. ²⁷*Cunningham v. Widing*, 5 Abb. 658. Pr. 413.

²³*Re Rowland*, 55 App. Div. 66, 8 ²⁸*Holmes v. Evans*, 129 N. Y. 140, N. Y. Anno. Cas. 397, 66 N. Y. Supp. 29 N. E. 233, 41 N. Y. S. R. 365.

1121. ²⁹*Johanson v. New York*, 71 App. Div. 561, 76 N. Y. Supp. 119.

²⁴*Tuck v. Manning*, 53 Hun. 455, 6 N. Y. Supp. 140; *Halbert v. Gibbs*, ³⁰*West v. Bacon*, 164 N. Y. 425, 58 16 App. Div. 126, 4 N. Y. Anno. Cas. N. E. 522.

232, 45 N. Y. Supp. 113. ³¹*Re King*, 168 N. Y. 53, 60 N. E.

²⁵*Fargo v. Paul*, 35 Misc. 568, 72 1054; *Goodrich v. McDonald*, 112 N. Y. Supp. 21; *Re H.* 93 N. Y. 381. Y. 157, 19 N. E. 649, 16 N. Y. Civ.

²⁶*Cunningham v. Widing*, 5 Abb. Proc. Rep. 222, 20 N. Y. S. R. 509.

can waive it by keeping silence when he should speak,³² or by allowing the court to make an order based upon the assumption that the client is the absolute owner of the judgment,³³ or he may waive it by refusing to pay his client the money which he has received without claiming a lien, and in a suit for conversion does not set up his lien,³⁴ or by not moving promptly to set aside a settlement fraudulent as to him.³⁵ He does not waive his lien when he delivers up property with a notice of his lien.³⁶

When an attorney of record refuses in the middle of an action to proceed either to judgment, or to argue an appeal taken, and another attorney appears in the matter, although not formally substituted, the attorney who is the cause of procuring the final adjudication in favor of his client has a lien upon the judgment for his services, and the courts will order a substitution of attorneys without condition, so that the attorney who is entitled to the lien may be in a position to receive the amount of his lien upon the settlement.³⁸

The attorney must act with diligence in seeking to enforce his lien. Though the statute of limitations does not apply to his lien, yet the court will be governed by analogy to it whenever the attorney applies to it for aid in enforcing his lien.³⁹

13. Necessity of a notice to protect the lien.—The lien of an attorney, given by § 66 of the Code of Civil Procedure as amended in 1879, is a statutory lien of which all the world must take notice; and anyone settling with a party without the knowl-

³²*Howitt v. Merrill*, 17 N. Y. S. R. 1007, 1 N. Y. Supp. 894.

³³*McClure v. Lockard*, 121 N. Y. 308, 24 N. E. 463, 31 N. Y. S. R. 69.

³⁴*De Fino v. Stern*, 5 App. Div. 56, 74 N. Y. S. R. 242, 38 N. Y. Supp. 616.

³⁵*Randall v. Van Wagenen*, 22 Jones & S. 483, Affirmed in 115 N. Y. 527, 22 N. E. 361; *Neill v. Van Wagenen*, 22 Jones & S. 477; *Winans v. Mason*, 33 Barb. 522, 21 How. Pr. 153.

³⁶*Corey v. Harte*, 21 N. Y. Week. Dig. 247.

³⁷*Fargo v. Paul*, 35 Misc. 568, 72 N. Y. Supp. 21.

³⁸*Buckley v. Buckley*, 45 N. Y. S. R. 827, 18 N. Y. Supp. 607; *Richardson v. Brooklyn City & N. R. Co.* 7 Hun, 69; *Winans v. Mason*, 33 Barb. 522, 21 How. Pr. 153; *Reavy v. Clark*, 18 N. Y. Civ. Proc. Rep. 272.

³⁹30 N. Y. S. R. 535, 9 N. Y. Supp. 216.

edge of the attorney does so at his own risk. The attorney is not bound at his peril to serve a notice of lien.⁴⁰ The lien is thus protected not only as to the taxable costs, but also to such additional amount as he may be able to establish by agreement expressed or implied.⁴¹ Before the amendment to § 66 of the Code of Civil Procedure, made in 1879, there were numerous cases which held that the attorney must protect his lien by notice in order to save it from a settlement made by his client with the opposite party. This amendment so enlarged the scope of the section that cases which arose before 1879 are now inapplicable upon this point. For several years after the passage of this amendment there was a lack of harmony upon this point. The majority of the cases held that the attorney was not bound at his peril to serve a notice of lien.⁴² A few cases held otherwise.⁴³ The case of *Coster v. Greenpoint Ferry Co.* 5 N. Y. Civ. Proc. Rep. 146, settled that question, holding that the service of a notice was not necessary. In that case the attorney for the plaintiff entered up judgment by default against the defendant, in ignorance of the fact that his client had settled the action with the defendant three days after the service of the summons and complaint in the action, and before any notice of lien had been served. The attorney for the plaintiff applied to the court for a reference to determine the amount of his lien. The defendant asserted that the attorney for the plaintiff had no lien, because the action had been settled before any notice of lien had

⁴⁰*Coster v. Greenpoint Ferry Co.* 49; *Tullis v. Bushnell*, 12 Daly, 217, 5 N. Y. Civ. Proc. Rep. 146, Affirmed 65 How. Pr. 466; *Kehoe v. Miller*, without opinion in 98 N. Y. 660; 10 Abb. N. C. 393, note; *Quinlan v. Peri v. New York C. & H. R. R. Co.* *Birge*, 43 Hun, 483. 7 N. Y. S. R. 152 N. Y. 521, 46 N. E. 849. 147; *Re Bailey*, 31 Hun, 608. 4 N. Y.

⁴¹*Coster v. Greenpoint Ferry Co.* Civ. Proc. Rep. 140; *Albert Palmer* 5 N. Y. Civ. Proc. Rep. 146; *Peri v. Co. v. Van Orden*, 17 Jones & S. 89, *New York C. & H. R. R. Co.* 152 4 N. Y. Civ. Proc. Rep. 44, 64 How. N. Y. 521, 46 N. E. 849. Pr. 79.

⁴²*Keeler v. Kesler*, 51 Hun, 505, 21 ⁴³*Jenkins v. Adams*, 22 Hun, 600; N. Y. S. R. 666, 4 N. Y. Supp. 580; *White v. Brady*, 4 Month. L. Bull. *Lewis v. Day*, 10 N. Y. Week. Dig. 39.

been served. The plaintiff's attorney was allowed to establish his lien not only for the amount of the taxable costs, but also for the amount of his contingent fee. No opinion was written either at general term or in the court of appeals. But there was no other question before the court and the affirmance by the court of appeals of the order of the court below settled the question as above stated. In *Peri v. New York C. & H. R. R. Co.* 152 N. Y. 521, 46 N. E. 849, the court distinctly affirms that an attorney's lien is a statutory lien of which all the world must take notice, and cites the case of *Coster v. Greenpoint Ferry Co.* as authority for that doctrine. This remark was *obiter*, as the court decided the question upon another point, yet the remark shows that the court of appeals considers the law to have been settled by it in the former case.

14. In what actions.—Since the amendment of § 66 of the Code of Civil Procedure, an attorney's lien attaches to actions in courts of record on contract and tort alike, not only for taxable costs, but for any sum in addition thereto, that the client and the attorney have agreed upon.⁴⁴

The attorney for a defendant has no lien where the answer does not set up a counterclaim. His client may settle the action without his knowledge, as he has only a common-law lien, which attaches only to a judgment.⁴⁵ An attorney has no lien under § 66 of the Code of Civil Procedure, until an action has been commenced. If the client refuses to proceed with a contemplated action, the attorney has no lien which the courts can enforce.⁴⁶

The cases which hold that an attorney can have no lien in ac-

⁴⁴*Peri v. New York C. & H. R. R.* 789, 3 N. Y. Supp. 386; *Brewi v. Co.* 152 N. Y. 521, 46 N. E. 849; *Pfeiffer*, 10 N. Y. Week. Dig. 203; *Astrand v. Brooklyn Heights R. Co.* *Pomeranz v. Marcus*, 40 Misc. 442, 24 Misc. 92, 53 N. Y. Supp. 294. 82 N. Y. Supp. 707.

⁴⁵*Longyear v. Carter*, 88 Hun. 513. ⁴⁶*Millis v. Pentelour*, 92 Hun. 284, 2 N. Y. Anno. Cas. 192, 68 N. Y. S. 72 N. Y. S. R. 333, 36 N. Y. Supp. R. 583, 34 N. Y. Supp. 785; *Levis v.* 906.
Burke, 51 Hun. 71, 20 N. Y. S. R.

tions upon a nonassignable cause of action have been superseded by the amendment in 1879 to § 66 of the Code of Civil Procedure.⁴⁷

There are a few cases decided since the amendment above noted which hold that the attorney does not have a lien on a nonassignable cause of action till judgment, but these decisions must have been made without the court's attention having been called to the change made in 1879. In such a case it was held that the attorney for the plaintiff did not have a lien upon his client's cause of action brought to recover damages for assault and battery.⁴⁸

15. Lien in special proceedings.—Prior to September 1, 1899, § 66 of the Code of Civil Procedure did not apply to special proceedings, but, by an amendment which went into effect on that date, provisions were added, so that now it does apply to all those proceedings. The lien attaches in a proceeding to disbar an attorney which has been dismissed with costs.⁴⁹

16. To what lien attaches.—Where a party recovers a judgment for costs which entitled him to a body execution against his adversary, the attorney is entitled to issue a body execution against the party for the collection of the costs, and his client cannot discharge the judgment debtor from arrest, without the consent of the attorney.⁵⁰

An attorney is entitled to a lien upon an undertaking given to his client upon the issuing of an attachment against him,⁵¹ and upon an undertaking given on bail.⁵²

⁴⁷*Peri v. New York C. & H. R. R.* *Tompkins v. Manner*, 18 Jones & S. Co. 152 N. Y. 521, 46 N. E. 849. 511.

⁴⁸*Cahill v. Cahill*, 9 N. Y. Civ. Proc. Rep. 241. ⁵¹*Bamberger v. Oshinsky*, 21 Misc. 716, 48 N. Y. Supp. 139; *Delancy v. Miller*, 84 Hun. 244, 32 N. Y. Supp. 505; *Perry v. Chester*, 53 N. Y. 240;

⁴⁹*Re Hahn*, 16 N. Y. Week. Dig. 357. Affirmed in 93 N. Y. 381. *Dienst v. McCaffrey*, 24 N. Y. Civ. Proc. Rep. 238, 66 N. Y. S. R. 200,

⁵⁰*Crouch v. Hoyt*, 24 N. Y. Civ. Proc. Rep. 60, 1 N. Y. Anno. Cas. 76, 62 N. Y. S. R. 126, 30 N. Y. Supp. 32 N. Y. Supp. 818; *Ely v. Cooke*, 28

406; *Wilkins v. Batterman*, 4 Barb. N. Y. 365, 373; *Ennis v. Curry*, 22 47; *Pinder v. Morris*, 3 Cal. 165; *Hun*, 584.

Martin v. Hawks, 15 Johns. 405; *Ten* ⁵²*Shackleton v. Hart*, 20 How. Pr. *Broeck v. De Witt*, 10 Wend. 617; 39, 12 Abb. Pr. 325. note.

He has a lien for his costs and allowances in supplementary proceedings upon a warrant of attachment issued to punish the judgment debtor for contempt.⁵³

An attorney has a lien upon the papers of his client in his hands where he has appeared in a criminal prosecution,⁵⁴ and upon a bond and mortgage in his hands for foreclosure, not only for costs in that action, but also for a general balance due him.⁵⁵

An attorney's lien does not attach to a wife's inchoate right of dower because she has no vested interest in the property; nor does it attach to alimony directed to be paid to her because alimony is awarded for the support of the wife and its amount is fixed with reference to her necessities and the courts will not countenance its appropriation to any other purpose.⁵⁶ He has no lien upon a mere defense which is not a counterclaim, and his client can settle the action, without his knowledge.⁵⁷ Nor has he a lien in an action for ejectment upon a claim for permanent improvements under § 1531 of the Code of Civil Procedure because such a claim cannot be made the subject of affirmative relief, and hence is not a counterclaim.⁵⁸

17. Title to costs.—The law governing the title to costs is found in the Code of Civil Procedure, and states explicitly that the costs are granted to the party.⁵⁹ It has been held in many cases where the court has had a discretion in the allowance of costs, as upon an accounting by an executor, or administrator, or by an assignee for the benefit of creditors, etc., that costs cannot be awarded to the attorney personally, but must be awarded to the party.⁶⁰ Nevertheless there are many statements in the re-

⁵³*Wolf v. Jacobs*, 13 Jones & S. 583.

⁵⁴*Re Russell*, 1 How. Pr. 149.

⁵⁵*Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489.

⁵⁶*Mooney v. Mooney*, 29 Misc. 707, 7 N. Y. Anno. Cas. 257, 62 N. Y. Supp. 769.

⁵⁷*White v. Sumner*, 16 App. Div. 70, 44 N. Y. Supp. 692.

⁵⁸*Pierson v. Safford*, 30 Hun, 521.

⁵⁹Code Civ. Proc. §§ 3228, 3229, 3066, 3070, 3072, etc.

⁶⁰*Devin v. Patchin*, 26 N. Y. 441; *Wilcox v. Smith*, 26 Barb. 316; *Re Brown*, 65 How. Pr. 461; *People ex rel. Reynolds v. Buffalo*, 9 Misc. 403,

ports which say that the costs belong to the attorney, and not to the client. These statements are often *obiter*, and have been made without keeping in mind the distinction between a lien which can be, and often has been, foreclosed, and the title to the property itself. It is obvious that a man cannot have a lien upon his own property. If a judgment for costs belong to the attorney, and not to the client, without anything being done, then in that case costs are awarded to the attorney, and not to the party.

The incongruity between the statutory provision that the costs are granted to the party and never to the attorney, and the remarks scattered through the books, that the costs belong to the attorney, is one of words, and not of substance. Costs always belong to the party. The attorney has a lien upon them till he has been paid for his services in the proceedings in which the costs were granted.⁶¹ He never has title to them until his lien has ripened, either by his own act or the action of some court, into an absolute title.

In questions arising between the party and his attorney the courts have uniformly held this. Difficulty arises only when the rights of the attorney and a third party conflict. In protecting the rights of the attorney the courts have done substantial justice, although they have not always had a clear perception of the principles underlying their decisions.

The court has power to settle the amount of an attorney's compensation whenever the question is properly brought before it either in an action or upon a motion. After such a decision the lien upon the costs is gone. The court either holds that the attorney has been paid and he therefore has no lien, or else that the attorney had a lien and by virtue of its decision this has ripened into an absolute title.

61 N. Y. S. R. 692, 29 N. Y. Supp. Misc. 11, 53 N. Y. Supp. 830; *Starin v. New York*, 106 N. Y. 82, 12 N. E.

⁶²*Taylor v. Long Island R. Co.* 25 643.

The courts also recognize the right of an attorney to reduce a judgment for costs to possession and ownership, either by receiving the money thereon, or by assuming dominion over the judgment as such. In either case he has received the amount of the costs to be applied upon the indebtedness of his client to him. Until the attorney has assumed dominion over a judgment for costs it belongs to his client,⁶² and an action thereon must be maintained in the client's name.⁶³ If the attorney seeks to enforce such a judgment to protect his own lien, he must commence the action in his own name, and thus become liable for costs if he is defeated.⁶⁴ The courts call an attorney who has assumed to treat a judgment for costs as belonging to him "an equitable assignee" thereof. He then has the legal title to such a judgment and may counterclaim it in an action brought against him by the judgment debtor,⁶⁵ or he may assert his rights in opposition to a motion to compel an offset of the costs awarded upon an order against the general costs in the same action,⁶⁶ or upon a motion to compel an offset of the costs in one action against the costs in another action between the same parties,⁶⁷ or at any time that anyone lays claim to the costs.⁶⁸

The attorney has a right as such equitable assignee to enter up

⁶²*Wehle v. Conner*, 83 N. Y. 231; ⁶³*Gibbs v. Prindle*, 11 App. Div. 470, 76 N. Y. S. R. 329, 42 N. Y. 61 N. Y. Supp. 969; *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53. *Supp.* 329; *Husted v. Thomson*, 26 Misc. 548, 91 N. Y. S. R. 558, 57

⁶³*Foley v. Scharmann*, 29 Misc. 521, 61 N. Y. Supp. 969. *N. Y. Supp.* 558; *DeLancy v. Miller*, 84 Hun. 244, 1 N. Y. Anno. Cas. 266, 65 N. Y. S. R. 834, 32 N. Y.

⁶⁴*Kipp v. Rapp*, 7 N. Y. Civ. Proc. Rep. 385, 2 How. Pr. N. S. 169. *Supp.* 505; *Berins v. Albro*, 86 Hun.

⁶⁵*Adams v. Stillman*, 4 Misc. 259, 53 N. Y. S. R. 180, 23 N. Y. Supp. 810. *Supp.* 1079.

⁶⁶*Tunstall v. Winton*, 31 Hun. 219, *Civ. Proc. Rep.* 253; *Adams v. Niagara Cycle Fittings Co.* 10 N. Y. Anno. Cas. 401, 74 N. Y. Supp. 485.

a judgment or an order for costs only, after the death of his client, and to enforce payment thereof by issuing an execution.⁶⁹

In *Re Barnes*, 140 N. Y. 468, 35 N. E. 653, the court, in construing an allowance made to an assignee for the benefit of creditors for the services of his attorney in an action, held that the allowance was to be considered as in addition to the taxable costs that the attorney had already collected. The court says: "These costs belong to the attorney, and not to the estate. Wherever the legal title to costs may be as between attorney and client before collection, after they have been collected by the attorney his lien upon them has been reduced to possession, and the client cannot insist upon their payment to him in the absence of a special agreement entitling him to receive them." This remark is *obiter*. The court, in effect, says that the collection by the attorney of these costs was a payment *pro tanto* upon his bill, and could not be recovered back, in the absence of an agreement to that effect, any more than any other payment could be recovered back. If the court below had considered that the value of the attorney's services was only the amount of the allowance made, it would have reduced the allowance by the amount of the costs that the attorney had already collected and applied upon his bill for services.

18. Transfer of cause of action pending the action.—Where, pending an action, the cause of action is assigned, the assignee takes it subject to the attorney's lien not only for taxable costs, but for such further sum as the attorney and his client have agreed upon.⁷⁰

Where a client makes a general assignment, which includes a judgment, the assignee takes the title to the judgment subject to the lien of the attorney.⁷¹

⁶⁹*Peetsch v. Quinn*, 6 Misc. 52, 56 *O'Sullivan*, 12 Misc. 577, 67 N. Y. N. Y. S. R. 607, 26 N. Y. Supp. 729; S. R. 801, 33 N. Y. Supp. 1098; *Lachenmeyer v. Lachenmeyer*, 65 *Creighton v. Ingersoll*, 20 Barb. 541. How. Pr. 422.

⁷⁰*Ward v. Craig*, 87 N. Y. 550;

⁷¹*Boyle v. Boyle*, 23 N. Y. Week. *Schnitzler v. Andrews*, 16 N. Y. Dig. 346; *Schwartz v. Jenney*, 10 N. Y. Week. Dig. 74; *McGregor v. Com-Y. Week. Dig. 67; Whitehead v. Stock*, 28 N. Y. 237.

An attorney for the original plaintiff has a lien upon the property purchased by the executor of the original plaintiff who has been substituted as plaintiff in a mortgage foreclosure action, and has employed another attorney. The fact that the attorney could have asserted his lien upon the substitution of attorneys is no bar to his claim asserted after the sale.⁷² And where the client sells the judgment subject to the lien of the attorney, the attorney has a lien on the proceeds received by the assignee.⁷³

19. Effect of settlement. *a. Upon lien.*—Parties may settle their differences without the knowledge or consent of their attorneys, but no settlement will defeat the attorney's lien.⁷⁴ And where the attorney has no notice of the settlement, he may enter up judgment which the courts will allow him to retain to protect his lien,⁷⁵ and where he has issued execution on the judgment, the execution and the judgment will not be set aside until the costs, disbursements, and sheriff's fees are paid.⁷⁶

b. As regards the parties.—The settlement as between the parties is good, and the attorney will not be allowed to enforce his lien, until it appears that his client is insolvent.⁷⁷

Where an administrator has settled an action brought by him and he has not been discharged as such administrator, the attorney must pursue the fund before he will be allowed to enforce his lien.⁷⁸ And where the plaintiff has stipulated to discontinue an action and afterwards moves to be relieved from the stipulation as it cuts off his attorney's claim for costs, the motion

⁷²*Skinner v. Busse*, 38 Misc. 265, 74 N. Y. Supp. 560.

⁷³*Re Gates*, 51 App. Div. 350, 64 N. Y. Supp. 1050.

⁷⁴*Peri v. New York C. & H. R. R. Co.* 152 N. Y. 521, 46 N. E. 849; *Coster v. Greenpoint Ferry Co.* 5 N. Y. Civ. Proc. Rep. 146, Affirmed in 98 N. Y. 660. See also *Necessity of a Notice to Protect the Lien*, § 13, *supra*.

⁷⁵*Coster v. Greenpoint Ferry Co.* 5 N. Y. Civ. Proc. Rep. 146.

⁷⁶*Publishers' Printing Co. v. Gillen Printing Co.* 15 Misc. 464, 74 N. Y. S. R. 669, 37 N. Y. Supp. 198.

⁷⁷*Pierson v. Safford*, 30 Hun, 521; *Burpee v. Townsend*, 29 Misc. 681, 61 N. Y. Supp. 467; *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53, 22 N. Y. Civ. Proc. Rep. 67, 42 N. Y. S. R. 856; *Pitcher v. Hoople*, 49 N. Y. S. R. 356, 21 N. Y. Supp. 66.

⁷⁸*Quinlan v. Birge*, 43 Hun, 483, 26 N. Y. Week. Dig. 161, 7 N. Y. S. R. 147.

will be denied.⁷⁹ The attorney might set aside the settlement, but he must be the moving party.⁸⁰

c. In actions in forma pauperis.—Where an action *in forma pauperis* has been brought for assault and battery, the attorney has no lien that can be protected upon settlement. Section 66 of the Code of Civil Procedure was intended to give a lien for the amount of an agreement, either express or implied. Here there can be no agreement. The attorney for the plaintiff is not entitled to costs until they are allowed by the court.⁸¹

d. When the client is irresponsible.—Where an action has been settled fraudulently and collusively for the purpose of depriving the attorney of his costs, and the client is financially irresponsible, the settlement will be set aside, not only to the extent of the taxable costs,⁸² but also to the extent of any additional sum that the client and attorney have agreed upon.⁸³ In some cases it does not appear that the client was insolvent,⁸⁴—especially where the judgment was for costs and disbursements.⁸⁵

Where a judgment is for costs only, or costs and an extra allowance, and the judgment is settled with the client, who is insolvent, the courts almost invariably set aside the settlement upon the application of the attorney, upon proof that he has not been compensated for his services.⁸⁶

⁷⁹*Avery v. Avery*, 5 Misc. 75, 23 N. Y. Civ. Proc. Rep. 204, 24 N. Y. Supp. 737.

⁸⁰*Murray v. Jibson*, 22 Hun. 386; *McBratney v. Rome*, W. & O. R. Co. 87 N. Y. 467.

⁸¹*Quinnan v. Clapp*, 10 Abb. N. C. 394, note.

⁸²*Mitchell v. Piqua Club Asso.* 15 Misc. 366, 25 N. Y. Civ. Proc. Rep. 139, 72 N. Y. S. R. 470, 37 N. Y. Supp. 406.

⁸³*Peri v. New York C. & H. R. R. Co.* 152 N. Y. 521, 46 N. E. 849; *Hommeyer v. Beere*, 13 N. Y. Civ. Proc. Rep. 169; *Guliano v. White-*

nack, 9 Misc. 562, 30 N. Y. Supp. 415; *Bollar v. Schoenwirt*, 30 Misc. 224, 63 N. Y. Supp. 311; *Vrooman v. Pickering*, 25 Misc. 277, 28 N. Y. Civ. Proc. Rep. 302, 54 N. Y. Supp. 389; *Whittaker v. New York & H. R. Co.* 18 Abb. N. C. 11, 22 Jones & S. 8, 11 N. Y. Civ. Proc. Rep. 189.

⁸⁴*Roberts v. Union Elec. R. Co.* 84 Hun. 437, 65 N. Y. S. R. 592, 32 N. Y. Supp. 387.

⁸⁵*Wright v. Fleming*, 10 N. Y. Week. Dig. 450.

⁸⁶*Commercial Telegram Co. v. Smith*, 57 Hun. 176, 19 N. Y. Civ.

e. Intent.—There is another class of cases which hold that the question of the good faith, or the lack of it on the part of the opposite party, is an important item upon the motion to set aside the settlement,⁸⁷ but under the later decisions, which have practically overruled the former cases,⁸⁸ the intent of the parties makes no difference.

20. Lien of attorney before the adoption of the Code of Civil Procedure.— Under the common law and the Code of Procedure, an attorney's lien did not attach till judgment,⁸⁹ and the court could only insist upon the payment of taxable costs, if the settlement was made for the purpose of defrauding the attorney, when the opposite party moved for an order of discontinuance or for leave to set up a settlement in a supplemental answer.⁹⁰

By the amendment in 1879 the attorney was given a lien from the commencement of the action. Before that amendment a respondent could settle with the appellant without notice to the appellant's attorney, as there was no judgment to which a lien could attach.⁹¹

21. Relief given by the court.— Where the court sets aside a satisfaction of judgment made in fraud of the attorney's rights, it will be set aside only to the extent of taxable costs, until the amount due the attorney in excess of the taxable costs has been liquidated in some proper action.⁹²

The lien of an attorney attaches not only to the original judg-

Proc. Rep. 32, 32 N. Y. S. R. 445, 10 York C. & H. R. R. Co. 71 N. Y. 443.
N. Y. Supp. 433; *McGregor v. Com-* 27 Am. Rep. 75.
stock, 19 N. Y. 581.

⁸⁷*Roberts v. Doty*, 31 Hun. 128; 493; *Owen v. Mason*, 18 How. Pr.
Root v. Van Duzen, 32 Hun. 63. 156; *McBratney v. Rome, W. & O. R.*

⁸⁸*Peri v. New York C. & H. R. R. Co.* 17 Hun. 385. Affirmed in 13 N. Y.
Co. 152 N. Y. 521, 46 N. E. 849. Week. Dig. 535; *Keane v. Keane*, 86

⁸⁹*Whittaker v. New York & H. R. Hun.* 159, 66 N. Y. S. R. 806, 33 N.
Co. 22 Jones & S. 8, 18 Abb. N. C. Y. Supp. 250.

11. 11 N. Y. Civ. Proc. Rep. 189; ⁹¹*Shank v. Shocemaker*, 18 N. Y.
Randall v. Van Wagenen, 115 N. Y. 489.

527, 12 Am. St. Rep. 828, 22 N. E. ⁹²*Bailey v. Murphy*, 136 N. Y. 50,
361, 17 N. Y. Civ. Proc. Rep. 403, 26 32 N. E. 627, 49 N. Y. S. R. 82.
N. Y. S. R. 438; *Coughlin v. New*

ment, but also to a judgment obtained upon notes given in settlement of the original judgment.⁹³ The lien is upon the actual cause of action, and not the one set out in the complaint; and where the client settles the action before answer, nothing being said about the costs, the plaintiff's attorney cannot enter a judgment for the amount claimed in the complaint with costs, but must enter judgment for the amount of settlement and costs.⁹⁴

Although a client may settle an action, where the attorney has a contingent interest, the opposite party settles at his peril, and will be obliged to respond to the attorney for his full claim.⁹⁵

Where an attorney for the plaintiff is to have a contingent fee, and has recovered judgment, an appeal from that judgment will not be dismissed upon consent of the parties, until the attorney has been paid the amount due him on his retainer.⁹⁶

22. Protection of lien upon substitution of attorneys. *a. Right of client to substitution of attorneys.*—A client has a right to change his attorney at any time without assigning any cause,⁹⁷ but the court will make it conditional upon the payment or securing of his attorney's fees.⁹⁸

b. Control of the court upon substitution of attorneys.—The supreme court, at special term or in the appellate division, has power to determine upon what terms an attorney may be changed, either upon motion or in summary proceedings instituted under § 66 of the Code of Civil Procedure.⁹⁹

⁹³*Spers v. Shultheis*, 28 N. Y. S. R. 50, 8 N. Y. Supp. 175.

⁹⁴*Albert Palmer Co. v. Van Orden*, 17 Jones & S. 89, 4 N. Y. Civ. Proc. Rep. 44.

⁹⁵*Peri v. New York C. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Coster v. Greenpoint Ferry Co.*, 5 N. Y. Civ. Proc. Rep. 146. Affirmed without opinion in 98 N. Y. 660. See also Necessity of a Notice to Protect the Lien, § 13, *supra*.

⁹⁶*Stilwell v. Armstrong*, 28 Misc. 546, 59 N. Y. Supp. 671.

⁹⁷*Re Prospect Ave.*, 85 Hun, 257, 1 N. Y. Anno. Cas. 347, 66 N. Y. S. R. 497, 32 N. Y. Supp. 1013.

⁹⁸*Re Mitchell*, 57 App. Div. 22, 9 N. Y. Anno. Cas. 224, 67 N. Y. Supp. 961.

⁹⁹*Re Barkley*, 42 App. Div. 597, 59 N. Y. Supp. 742; Rule 10 General Rules of Practice; *Sheldon v. Mott*, 91 Hun, 637, 70 N. Y. S. R. 894, 35 N. Y. Supp. 1117; *Hinman v. Derlin*, 40 App. Div. 234, 57 N. Y. Supp. 1037.

If the attorney and his client cannot agree upon what terms a substitution of attorneys shall be made, the matter will be determined by the court or will be sent to a referee to ascertain the amount due the attorney, and upon the coming in and confirmation of his report, and the payment of the amount found due, and the expenses of the reference, a substitution will be ordered.¹⁰⁰

The attorney of course is entitled to hold the papers in the action, and upon which he has a lien, until the amount due him is fixed either by the parties or by the court upon a reference and this amount is paid him.¹⁰¹

The attorney's lien upon a substitution of attorneys will be confined to the papers in that action, and will not include all the property of his client involved in that action.¹⁰²

c. Discontinuance of proceedings for substitution of attorneys.—A client may be allowed to abandon his application for a change of attorneys upon the coming in of the referee's report, and may be ordered to pay the expenses of the reference, but he cannot be ordered to pay the attorney the amount reported to be due by the referee.¹⁰³

But the right of a client to discontinue a reference is a matter of favor resting with the court, and the decision of the court upon the confirmation of the referee's report cannot be attacked collaterally.¹⁰⁴

d. How the extent of the lien is determined.—A client is not entitled to a substitution of attorneys upon his giving a bond to pay the attorneys such a sum as they may be able to recover upon a trial before a jury. Where a client makes such a motion, the court may order a reference to ascertain the amount due the

¹⁰⁰*Ogden v. Devlin*, 13 Jones & S. 631; *Ulster County v. Brodhead*, 44 How. Pr. 411. ¹⁰²*Hinman v. Devlin*, 40 App. Div. 234, 57 N. Y. Supp. 1037.

¹⁰³*Gardiner v. Tylor*, 36 How. Pr. 63. Affirmed in 5 Abb. Pr. N. S. 33. ¹⁰⁴*Re Davis*, 7 Daly, 1. 60 How. Pr. 380.

attorneys. The client, having submitted himself to the jurisdiction of the court, must be deemed to have waived his right to a jury trial, and the court may send it to a referee to fix his compensation.¹⁰⁵ If a client would be embarrassed because the action would be brought to trial before the amount due the attorney could be ascertained, the court can order an immediate substitution, upon the client's executing a bond to pay whatever sum may be found due the attorney upon a reference.¹⁰⁶

Upon an appeal from the order of the court fixing the amount of the lien, the appellate court is at liberty to examine the record to see what would be fair and reasonable compensation for the attorney.¹⁰⁷

A substitution of attorneys will not be ordered where the client's interest has been taken by a receiver in supplementary proceedings, and the attorney's interest in the cause of action by reason of a contingent fee is greater than that of the assignee.¹⁰⁸

c. Terms upon substitution of attorneys.—A substituted attorney is liable personally for the amount of fees, mentioned in an order of substitution, which he is to collect and pay to the former attorney, if they come into his hands. It is no defense to an action thereon that he has paid this money to his client.¹⁰⁹

An order retaining an attorney's lien upon the fund is proper, where he agreed to take his pay out of the recovery, and the client changes attorneys without alleging any misconduct on the part of his former attorney.¹¹⁰ The court will order a substi-

¹⁰⁵*Philadelphia v. Postal T'leg. Co.* *Hinman v. Devlin*, 40 App. Div. 234, 1 App. Div. 387, 72 N. Y. S. R. 617, 57 N. Y. Supp. 1037.

37 N. Y. Supp. 291; *Ackerman v. Steenburgh v. Miller*, 11 App. Div. 286, 42 N. Y. Supp. 333.
Dimick v. Cooley, 3 N. Y. Civ. Proc. Rep. 141, 151. ¹⁰⁹*Bittiner v. Goldman*, 19 Misc. 146, 43 N. Y. Supp. 389, Second Appeal 20 Misc. 330, 45 N. Y. Supp. 953.

¹⁰⁶*Yueugling v. Betz*, 58 App. Div. 8, 68 N. Y. Supp. 574.

¹⁰⁷*Dean v. Driggs*, 82 Hun, 561, 64 N. Y. S. R. 183, 31 N. Y. Supp. 548, Affirmed on this opinion in 145 N. Y. 595, 40 N. E. 163, 65 N. Y. S. R. 865; ¹¹⁰*Stewart v. Steek*, 6 N. Y. S. R. 524; *Jeffards v. Brooklyn Heights R. Co.* 49 App. Div. 45, 63 N. Y. Supp. 530.

tution of attorneys upon payment being made to the attorney for services in that action, and will not order the client to pay for other services before a substitution is made.¹¹¹ A client will not be allowed to change attorneys until his attorney is paid, although the attorney was employed by a third person in whose interest the action was brought.¹¹² A new attorney will not be substituted in place of the original attorney, until the client has repaid money advanced by the attorney upon faith of the cause of action, or until he has assigned enough of the claim to repay the attorney.¹¹³

23. Substitution of attorneys when lien has been waived.—The court will order a substitution where the attorney refuses to proceed till paid for his services, in which case he is held to have discharged himself, and therefore has destroyed his lien,¹¹⁴ but when the court goes further and orders the attorney to dissolve all his relations with his client and give up papers in other actions upon which he has a lien, it should provide for a settlement of all matters between the attorney and his client.¹¹⁵

24. Substitution of attorneys when attorney has been guilty of misconduct.—Where an attorney has been guilty of misconduct,¹¹⁶ or his services have been valueless,¹¹⁷ the court may order a substitution of attorneys unconditionally, and leave the attorney to his remedy by action. The fact that an attorney has been negligent, and therefore has lost his lien, may be deter-

¹¹¹*People's Bank v. Thompson*, 24 27 N. Y. Supp. 723; *Philadelphia v. N. Y. Civ. Proc. Rep.* 62, 63 N. Y. *Postal Teleg. Cable Co.* 1 App. Div. S. R. 165, 30 N. Y. Supp. 858; *Re* 387, 72 N. Y. S. R. 617, 37 N. Y. *Wilson*, 2 N. Y. Civ. Proc. Rep. Supp. 291.

(*Browne*) 343; *Re Davis*, 7 Daly, 1. ¹¹⁰Rule 10; *Barkley v. New York C. & H. R. R. Co.* 35 App. Div. 167, 54 N. Y. Supp. 970; *Halbert v. Abb. Pr.* 336.

¹¹²*Hoffman v. Van Nostrand*, 14 *C. & H. R. R. Co.* 35 App. Div. 167, 54 N. Y. Supp. 970; *Halbert v.*

¹¹³*Howland v. Taylor*, 6 Hun, 237. *Gibbs*, 16 App. Div. 126, 2 N. Y. ¹¹⁴*Tuck v. Manning*, 54 Hun, 455, Anno. Cas. 232, 45 N. Y. Supp. 113; 17 N. Y. Civ. Proc. Rep. 175, 25 N. *Pierce v. Waters*, 10 N. Y. Week. Y. S. R. 130, 6 N. Y. Supp. 140; *Re* Dig. 432.

H. 93 N. Y. 381. ¹¹⁷*Reynolds v. Kaplan*, 3 App. Div. ¹¹⁵*McKibbin v. Nafis*, 76 Hun, 344, 420, 38 N. Y. Supp. 764.

mined by a reference upon a motion to substitute attorneys, and such adjudication is conclusive upon him and all claiming under him.¹¹⁸

25. Costs of proceedings to ascertain amount of attorney's lien.—

A proceeding brought to ascertain the amount of the attorney's lien in order that a substitution of attorneys may be made is a special proceeding,¹¹⁹ and the costs are governed by § 3240 of the Code of Civil Procedure.¹²⁰

The attorney is the prevailing party where there is found to be a substantial sum due him, although he claimed a much larger sum. The client, to put the attorney in default for refusing to deliver up his client's papers, should, before instituting the proceedings, have offered to pay the amount of the lien or the sum to which the attorney was fairly entitled.¹²¹

A judgment may be entered upon the confirmation of the referee's report.¹²² The court may make provisions in the order for the payment of the amount of the attorney's lien, and the costs, and disbursements of the proceedings as provided by law,¹²³ without the entry of a formal judgment.

The court has power to provide in the order for an execution to issue in favor of the person to whom costs are awarded.¹²⁴

26. Power of court to protect attorney when he has no lien.—

The court has inherent power to protect its own officers against collusion and fraud, practised by the parties after they have come before it for trial. It may, under such circumstances, refuse to enter an order of discontinuance based upon a stipulation

¹¹⁸*Williams v. Barkley*, 165 N. Y. 155; General Rule 27; *Greenfield v.* 48, 58 N. E. 765. *New York*, 28 Hun. 320. *Contra*,

¹¹⁹*Ward v. Ward*, 67 App. Div. 121, *Ward v. Ward*, 67 App. Div. 121, 73 N. Y. Supp. 450. *Myer v. Abbett*, 20 N. Y. Supp. 450; 46 N. Y. Supp. 822.

¹²⁰*Ward v. Ward*, 67 App. Div. 121, App. Div. 390, 46 N. Y. Supp. 822. 73 N. Y. Supp. 450. ¹²³*Ward v. Ward*, 67 App. Div. 121.

¹²¹*Ward v. Ward*, 67 App. Div. 121, 73 N. Y. Supp. 450. ¹²⁴Code Civ. Proc. § 779; *Ward v.* 73 N. Y. Supp. 450.

¹²²*Griggs v. Brooks*, 79 Hun. 394. *Ward*, 67 App. Div. 121, 73 N. Y. 61 N. Y. S. R. 499, 29 N. Y. Supp. Supp. 450. 794; *Austin v. Rawdon*, 42 N. Y.

of the parties till the costs of the defendant are paid, although the answer did not set up a counterclaim, and therefore the attorney has no lien.¹²⁵

In an equity action where both parties are willing to settle, but the attorney for the defendant objects upon the ground that he would have a lien upon the money coming into the hands of the court, although the answer does not term the defense a counterclaim, the action will be discontinued on the ground that the attorney is bound by his answer, and the further ground that neither party would be entitled to costs in an equity action till they were allowed by the court.¹²⁶

27. Lien in supplementary proceedings.—The court will not order a sale by the receiver in supplementary proceedings of a cause of action belonging to the judgment debtor, then in litigation, upon which an attorney has a lien prior to and larger than that of the receiver.¹²⁷ The receiver may be substituted as plaintiff therein,¹²⁸ and the order should provide that the receiver should have the same attorney, or, if he desires a change of attorneys, he must apply to the court upon notice to the present attorney.¹²⁹

The court has power to decide to whom money in the hands of the sheriff, received upon execution, should be paid, where the attorney claims a lien for more than the taxable costs, and the client has assigned his interest therein;¹³⁰ and it will do this although it involves the attorney's lien in another related action.¹³¹

¹²⁵*National Exhibition Co. v. Crane*, 167 N. Y. 505, 60 N. E. 768; *Wormer v. Canoran*, 7 Lans. 36.
¹²⁶*Brewi v. Pfeiffer*, 10 N. Y. Week. Dig. 203.

¹²⁷*Re Patterson*, 12 App. Div. 123, 42 N. Y. Supp. 495.

¹²⁸*Re Patterson*, 12 App. Div. 123, 42 N. Y. Supp. 495; *Re Wilds*, 6 Abb. N. C. 307.

¹²⁹*Re Wilds*, 6 Abb. N. C. 307.

¹³⁰*Marrin v. Marvin*, 22 N. Y. Civ. Proc. Rep. 274, 46 N. Y. S. R. 259, 19 N. Y. Supp. 371; *Loaners' Bank v. Nostrand*, 21 Jones & S. 525.

¹³¹*Loaners' Bank v. Nostrand*, 21 Jones & S. 525.

The court under rule 77 will not allow money to be taken out from under its control, until the claims of its officers are paid, even though they have no lien upon it.¹³² The state court will retain control of the fund in an action brought by a receiver appointed by the state court until the liens acquired in the state court are paid, although an assignee in bankruptcy takes control of the action.¹³³

Upon a motion to dismiss an appeal to the court of appeals on the ground that the parties had settled their differences, the motion was granted with costs to respondent to the time of the motion, and the costs of opposing the motion with permission to test the validity of the settlement in the court below.¹³⁴

28. Lien when the action is brought in a representative capacity.

— An executor, administrator, or a trustee who employs an attorney in the settlement of an estate is liable personally for the services thus rendered. He cannot be made liable in his representative capacity,¹³⁵ unless the testator made the expenses of administration a charge on the estate.¹³⁶

The allowance made to an executor upon an accounting is not conclusive between the attorney and client. It is simply an allowance of so much to the executor in exoneration of his liability to his attorney.¹³⁷

An attorney has no lien upon any property coming into his hands belonging to the estate, for payment of his services rendered to the executor or trustee in the matter of the estate,¹³⁸ unless the property is the result of his services; in which case he

¹³²*Atlantic Sav. Bank v. Hiler*, 3 Hun, 209.

¹³³*Clark v. Binninger*, 1 Abb. N. C. 421.

¹³⁴*Debbe v. Debbe*, 50 N. Y. 695.

¹³⁵*Wilcox v. Smith*, 26 Barb. 316; *Mygatt v. Wilcox*, 1 Lans. 55, Affirmed in 45 N. Y. 306, 6 Am. Rep. 90; *Austin v. Munro*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 N. Y. 315.

¹³⁶*Boynton v. Laddy*, 50 Hun, 339, 20 N. Y. S. R. 148, 3 N. Y. Supp. 93.

¹³⁷*Mygatt v. Wilcox*, 1 Lans. 55, Affirmed in 45 N. Y. 306, 6 Am. Rep. 90.

¹³⁸*De Lamater v. McCaskie*, 4 Dem. 549.

has the same lien as he would had he performed the services for his client in his personal capacity.¹³⁹ This is true although his client is a foreign executor.¹⁴⁰

An executor or administrator is authorized in bringing an action under §§ 1902 and 1903 of the Code of Civil Procedure,¹⁴¹ or otherwise, to employ an attorney, who will have a lien upon the judgment for his services to the amount of their expressed or implied agreement.¹⁴² But where the attorney was retained by the executor for his own individual benefit, the attorney can acquire no lien upon the estate.¹⁴³ The attorney can recover the amount of his lien without waiting to have the question of reasonableness of the amount passed upon by the surrogate upon a final accounting.¹⁴⁴ But where the executor or administrator is an attorney, neither he nor the firm of which he is a member can recover for legal services rendered to the estate.¹⁴⁵ Consequently no lien can be acquired for such services.

The rule is different where one partner of a firm of attorneys, as an executor, employs his partner to perform legal services for him, and the executor does not share in the amount thus received. Such an agreement must be clearly proved and is always open to suspicion.¹⁴⁶ A client can make an agreement that his attorney shall have a certain percentage of his share in the estate, just as he can employ an attorney in any other un-

¹³⁹*Arkenburgh v. Little*, 64 N. Y. 127, 29 Am. Rep. 111; *Harwood v. Supp.*, 742; *Arkenburgh v. Arkenburgh*, 27 Misc. 760, 59 N. Y. Supp. 1000; *Re Knapp*, 85 N. Y. 284, 612; *Gunning v. Quinn*, 81 Hun. 522, 30 N. Y. Supp. 1015; *Re Knapp*, 85 N. Y. 284.

¹⁴⁰*Re King*, 168 N. Y. 53, 60 N. E. 1054.

¹⁴¹*Lee v. Van Voorhis*, 78 Hun. 575, 61 N. Y. S. R. 220, 29 N. Y. Supp. 571.

¹⁴²*Kennedy v. Steele*, 35 Misc. 105, 71 N. Y. Supp. 237; *Randall v. Dusenbury*, 7 Jones & S. 174, Affirmed in 63 N. Y. 645; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y.

¹⁴³*Laurence v. Townsend*, 88 N. Y. 24.

¹⁴⁴*Kennedy v. Steele*, 35 Misc. 105, 71 N. Y. Supp. 237.

¹⁴⁵*Parker v. Day*, 12 Misc. 510, 67 N. Y. S. R. 378, 33 N. Y. Supp. 676; *Collier v. Munn*, 41 N. Y. 143, 7 Abb. Pr. N. S. 193.

¹⁴⁶*Re Simpson*, 36 App. Div. 562, 55 N. Y. Supp. 697, Affirmed without opinion in 158 N. Y. 720, 53 N. E. 1132.

dertaking upon a contingent retainer. The rights of the parties will be adjusted according to their contract. If the attorney is to receive his fee from the amount that his client chooses to take, and the client reserves the right to settle upon such terms as he chooses, the attorney cannot prosecute the proceedings to protect his lien.¹⁴⁷ The result would be different if the client had agreed that the attorney should be consulted upon any settlement.¹⁴⁸ Since the surrogate's court has been made a court of record, it has the same power to protect an attorney's lien that the supreme court has. It can set aside the satisfaction of its decree in order to protect such a lien, independent of any question of actual fraud or collusion. Where the value of the attorney's services has been liquidated by a judgment in an action brought by the attorney against the client, the surrogate will not be required to determine their value.

The return of an execution unsatisfied, issued upon such a judgment, is *prima facie* evidence that the client is financially irresponsible.¹⁴⁹

The surrogate has power to make an order for the safe keeping of the money upon which an attorney claims a lien, until the rights of the parties are determined;¹⁵⁰ but he has no general power over attorneys, and cannot decide a question of lien upon papers in the hands of an attorney when there is no cause before him, although both parties request him to do so.¹⁵¹

29. Effect of statute of limitations upon lien.—The statute of limitations does not pay an indebtedness, but may be invoked by the defendant in any action as an affirmative defense. The enforcing of a lien is not an action, and the statute is not a bar to

¹⁴⁷*Re Evans*, 58 App. Div. 502, 69 N. Y. Supp. 482; *Re Evans*, 65 App. Div. 100, 72 N. Y. Supp. 495. ¹⁵⁰*Re Rowland*, 55 App. Div. 66, 66 N. Y. Supp. 1121; *Re De Oraindi*, 31 N. Y. S. R. 744, 9 N. Y. Supp. 873.

¹⁴⁸*Re Fernbaeher*, 18 Abb. N. C. 1; *Eisner v. Avery*, 2 Dem. 466. ¹⁵¹*Re Krakauer*, 33 Misc. 674, 68 N. Y. Supp. 935.

¹⁴⁹*Re Regan*, 167 N. Y. 338, 10 N. Y. Anno. Cas. 125, 60 N. E. 658.

such proceedings, but it rests in the discretion of the court whether or not it will be governed by the analogy of the statute of limitations,¹⁵² but the lien cannot be enforced by an action after the statute has run against the claim, if the statute be pleaded.

The attorney, however, may retain money that has come into his hands in satisfaction of a claim for services against which the statute of limitations has run.¹⁵³

The statute commences to run from the time that the attorney could have maintained an action against his client.¹⁵⁴

30. Assignment of lien.— An attorney may assign his claim, but he cannot deliver to the assignee his client's papers upon which he has a lien, as the relation is strictly personal.¹⁵⁵

The courts will recognize such an assignment either in an action brought by the assignee,¹⁵⁶ or in the distribution of a fund in court.¹⁵⁷

An assignee or any other person who derives a right from the attorney, as counsel or otherwise, to share in the compensation to be paid by the client, will lose his right to compensation or his lien therefor when the attorney, by his act, loses his right to compensation or lien. The right of the attorney to a lien may be adjudicated upon a motion to substitute attorneys, and such determination is binding on those claiming under the attorney though they were not parties to the proceedings.¹⁵⁸

31. Right to enforce lien upon securities.— An attorney has authority under his original retainer to issue an execution upon the judgment obtained either against the property or the per-

¹⁵²*Richardson v. Brooklyn City & N. R. Co.* 7 Hun, 69; *Reary v. Clark*, 18 N. Y. Civ. Proc. Rep. 272, 30 N. Y. S. R. 535, 9 N. Y. Supp. 216.

¹⁵³*Maxwell v. Cottle*, 72 Hun, 529, 55 N. Y. S. R. 127, 25 N. Y. Supp. 635.

¹⁵⁴*Adams v. Ft. Plain Bank*, 36 N. Y. 255.

¹⁵⁵*Sullivan v. New York*, 68 Hun, 48, 58 N. E. 765.

544, 52 N. Y. S. R. 557, 22 N. Y. Supp. 1041.

¹⁵⁶*Sullivan v. New York*, 68 Hun, 544, 52 N. Y. S. R. 557, 22 N. Y. Supp. 1041.

¹⁵⁷*Muller v. New York*, 23 N. Y. Civ. Proc. Rep. 261, 29 N. Y. Supp. 1096.

¹⁵⁸*Williams v. Barkley*, 165 N. Y.

son.¹⁵⁹ The client cannot discharge the judgment debtor from arrest and thus destroy the attorney's lien. Nor where the attorney has sued the sheriff for the amount of an execution, can the client settle with the sheriff and defeat the attorney's lien.¹⁶⁰

The attorney may, with the consent of the court, maintain an action in the name of his client upon the securities given to his client pending the action, such as undertakings,¹⁶¹ or upon an undertaking given upon an appeal.¹⁶²

32. How lien is enforced. *a. Supplementary proceedings.*—An attorney may enforce his lien on a judgment by instituting supplementary proceedings thereon although the client has executed a satisfaction of judgment.¹⁶³ He may do this, although his client has transferred the judgment to a third person,¹⁶⁴ who does not wish to have these proceedings instituted.¹⁶⁵

The affidavit upon which the order of examination is based should, in addition to the usual allegations, show that the proceedings are instituted by the attorney for the purpose of enforcing his lien.¹⁶⁶ An omission in the affidavit of such an allegation is sufficient ground for vacating the order.¹⁶⁷

It has been held that the attorney must procure the consent of the court before instituting such proceedings.¹⁶⁸

b. After settlement by the parties.—Parties have a right to settle their differences in spite of the attorney's lien, and when this settlement is honestly made, and not fraudulently or collusively for the purpose of cheating the attorney out of the pay for his services, the lien attaches to the settlement, the same as

¹⁵⁹*Parker v. Spear*, 62 How. Pr. ville, 10 Abb. N. C. 395, note; *Moore v. Taylor*, 2 How. Pr. N. S. 343.

¹⁶⁰*Wilber v. Baker*, 24 Hun. 24.

¹⁶¹*Shackelton v. Hart*, 20 How. Pr. C. 395, note.

¹⁶²39, 12 Abb. Pr. 325, note.

¹⁶³*Kipp v. Rapp*, 2 How. Pr. N. S. Civ. Proc. Rep. 24; *Russell v. Somerville*, 10 Abb. N. C. 395, note.

¹⁶⁴*Shaunessy v. Traphagen*, 13 N. Y. S. R. 754.

¹⁶⁵*Merchant v. Sessions*, 5 N. Y. Civ. Proc. Rep. 24; *Moore v. Taylor*, 2 How. Pr. N. S. 343.

it would to a judgment. If the settlement is for nothing, the lien is extinct. The client is the principal debtor and the opposing party is the surety. The surety cannot be made liable as long as the amount can be recovered of the principal. If the surety pays the money to the principal who is insolvent, and allows him to dissipate it, then the settlement will be set aside.¹⁶⁹ The attorney need not show that the settlement was fraudulent; it is sufficient to show that he is injured thereby.¹⁷⁰

If the client receives money in the settlement of an action, of which the attorney was to receive a certain share, the attorney cannot bring an action against his client for the money, because the attorney and his client are tenants in common of the fund.¹⁷¹

c. By summary proceedings.—Since the amendment to § 66 of the Code of Civil Procedure in 1899, the court upon the petition of the client or the attorney may determine and enforce the lien of the attorney. This summary method can only be used when it is a question between the attorney and his client, or if other parties are concerned, where they submit themselves to that method of procedure.¹⁷² Neither the client nor the attorney is entitled to a jury trial.¹⁷³ These proceedings may be entertained by the supreme court where the services for which the lien is claimed were performed in the surrogate's court.^{173a} It is probable that the surrogate's court would also have jurisdiction to determine the lien.

¹⁶²*Zimmer v. Metropolitan Street R. Co.* 32 Misc. 262, 65 N. Y. Supp. 311; *Hommeyer v. Beere*, 13 N. Y. Civ. Proc. Rep. 169, 977; *Dolliver v. American Swan-Boat Co.* 32 Misc. 264, 8 N. Y. Anno. Cas. 74, 31 N. Y. Civ. Proc. Rep. 94, 65 N. Y. Supp. 978; 733. ¹⁷⁰*Tullis v. Bushnell*, 12 Daly. 217. ¹⁷¹*Stafford v. Ashell*, 8 Misc. 316, 59 N. Y. S. R. 287, 28 N. Y. Supp. 977. ¹⁷²*Zimmer v. Metropolitan Street R. Co.* 32 Misc. 262, 65 N. Y. Supp. 311. ¹⁷³*Canary v. Russell*, 10 Misc. 597, 24 N. Y. Civ. Proc. Rep. 109, 63 N. Y. S. R. 132, 25 N. Y. Civ. Proc. Rep. 327, 38 N. Y. Supp. 784; ^{173a}*Re Pieris*, 82 App. Div. 466, 81 *Bollar v. Schocnirt*, 30 Misc. 224, N. Y. Supp. 927.

d. Foreclosure of lien.—Where the parties to an action have settled it before judgment the attorney may bring an equitable action to enforce his lien, making both parties to the action parties defendant.¹⁷⁴ In such a case if the attorney succeeds, he will obtain a judgment against his client for the amount of his lien, and an alternative judgment against the opposing party, that he pay the amount of the lien if the attorney cannot collect it from his client.¹⁷⁵ The attorney cannot by motion compel his client's adversary to pay him the value of his services, even though such adversary has settled with his client and agreed to pay the attorney, because the party agreeing to pay is entitled to have the question of the amount settled in an action.¹⁷⁶

e. Paid out of fund.—The court will not determine the amount of an attorney's lien upon a fund in court without a notice to the client of the application.¹⁷⁷ Neither can the lien of an attorney upon an award for land taken in opening a street be enforced by a petition or motion,¹⁷⁸ but it must be enforced in an equitable action.¹⁷⁹

f. Setting aside collusive and fraudulent settlements.—A settlement of an action is collusive and fraudulent, when it is made to deprive the attorney for the successful party, or the party who will ultimately be successful, of the fruits of his labors.

The courts will set aside such a settlement whether made before or after judgment, whenever it is necessary to protect the attorney's lien. The attorneys for the parties should be notified

¹⁷⁴*Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. Y. App. Div. 22, 30 E. 395. *Pilkington v. Brooklyn Heights R. Co.* 49 App. Div. 22, 30

¹⁷⁵*Kennedy v. Steele*, 35 Misc. 105, 71 N. Y. Supp. 237; *Dolliver v. American Swan-Boat Co.* 32 Misc. 264, 8 N. Y. Anno. Cas. 74, 31 N. Y. Civ. Proc. Rep. 94, 65 N. Y. Supp. 978.

¹⁷⁷*Atty. Gen. v. North America L. Ins. Co.* 17 N. Y. Week. Dig. 508.

¹⁷⁸*Deering v. Schreyer*, 58 App. Div. 322, 68 N. Y. Supp. 1015.

¹⁷⁹*Rochfort v. Metropolitan Street R. Co.* 50 App. Div. 261, 30 N. Y. 602, 52 N. Y. Supp. 203.

of the intended settlement.¹⁸⁰ The settlement is good as between the parties, and will stand until the attorney shows to the court that he cannot collect the value of his services from his client. This he must show affirmatively. When this is done the settlement will be set aside to the extent of his lien.¹⁸¹

The court will in such cases set aside a settlement made before judgment, and allow the attorney to proceed with the action to judgment to protect his lien.¹⁸²

An attorney may maintain an action in his own name to recover specific property, the proceeds of an action, which he, by agreement with his client, was to have for his services in that action, and which have come into the hands of a third party.¹⁸³

g. By continuing action. (1) *Right of attorney to continue action.*—There is a conflict of decisions whether an attorney after the settlement of the action by the parties before judgment can proceed in that action for the purpose of enforcing his lien. The weight of authority is undoubtedly that in case of such a settlement he must apply to the court upon notice to all interested parties for leave to continue the action to protect his lien, and become himself responsible for costs therein.¹⁸⁴

There are some cases, however, which hold that the attorney

¹⁸⁰*Eberhardt v. Schuster*, 10 Abb. 26 N. Y. S. R. 115, 7 N. Y. Supp. 99; N. C. 374.

¹⁸¹*Pickard v. Yencer*, 21 Hun, 403, *Tullis v. Bushnell*, 65 How. Pr. 465; 10 N. Y. Week. Dig. 271; *Zimmer v. Murray v. Jibson*, 22 Hun, 386; *Metropolitan Street R. Co.*, 32 Misc. *Stahl v. Wadsworth*, 13 N. Y. Civ. Proc. Rep. 32, 10 N. Y. S. R. 145, 12 N. Y. Supp. 977.

¹⁸²*Rasquin v. Knickerbocker Stage Co.*, 21 How. Pr. 293, 12 Abb. Pr. 324, *Y. Civ. Proc. Rep.* 146, Affirmed in

¹⁸³*Fairbanks v. Sargent*, 104 N. Y. 98 N. Y. 660; *Lablache v. Kirkpatrick*, 8 N. Y. Civ. Proc. Rep. 256; 108, 58 Am. Rep. 490, 9 N. E. 870.

¹⁸⁴*Quinlan v. Birge*, 43 Hun, 483; *Kipp v. Rapp*, 2 How. Pr. N. S. 169, *Martin v. Hawks*, 15 Johns. 405; 7 N. Y. Civ. Proc. Rep. 385; *Wash-Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Rep.* 439, 34 N. Y. S. R. 145, 12 N. Y. Supp. 111; *Williams v. Wilson*, Y. 368; *Pulver v. Harris*, 52 N. Y. 18 Misc. 42, 40 N. Y. Supp. 1132; 73; *Dimick v. Cooley*, 3 N. Y. Civ. Proc. Rep. 141; *Olinell v. Verdun-halven*, 17 N. Y. Civ. Proc. Rep. 362, *Keeler v. Keeler*, 51 Hun, 505, 21 N. Y. S. R. 666, 4 N. Y. Supp. 580; *Ad-sit v. Hall*, 3 How. Pr. N. S. 373.

has a right, without an application to the court, to proceed with the action where it has been settled by the parties before judgment.¹⁸⁵

(2) *Leave to prosecute the action; when granted.*—Leave to prosecute an action will be refused unless the attorney can show the court that he cannot collect of his client the value of his services.¹⁸⁶ Leave to prosecute an action is always in the discretion of the court. The courts will not allow an attorney to continue an action for the purpose of protecting his lien, when the action is brought for a divorce or a separation. See Lien in Matrimonial Actions, § 39, *infra*.

In one case the court refused to allow the plaintiff's attorney to proceed with the action, but upon proof upon the motion that the plaintiff was irresponsible, and that his agreement with his attorney was that he should have a certain percentage of the recovery, directed the defendant to pay to the plaintiff's attorney the amount which he was to receive from his client.¹⁸⁷

Where, upon a contest to the probate of a will, the contestants assigned to their attorney a certain portion of the recovery, but retained the right to compromise and settle the contest, the attorney was not allowed to continue the contest to protect his lien. His remedy was confined to his lien upon the sum received by his clients in settlement.¹⁸⁸

(3) *Proof on the trial.*—An attorney, when he is allowed to proceed with the action, must prove his client's case.¹⁸⁹

33. Right of defendant to set up settlement in his answer.—

¹⁸⁵*Minto v. Bauer*, 3 Silv. Sup. Ct. 332, 17 N. Y. Civ. Proc. Rep. 314, 25 N. Y. S. R. 559, 6 N. Y. Supp. 444. Modified in 29 N. Y. S. R. 366, 8 N. Y. Supp. 933; *Forstman v. Schulting*, 35 Hun, 505; *Wilber v. Baker*, 24 Hun, 24.

¹⁸⁶*Quinlan v. Birge*, 43 Hun, 483, 26 N. Y. Week. Dig. 161, 7 N. Y. S. R. 147; *Young v. Howell*, 64 App. Div. 246, 72 N. Y. Supp. 5.

¹⁸⁷*Schriever v. Brooklyn Heights R. Co.* 30 Misc. 145, 30 N. Y. Civ. Proc. Rep. 67, 61 N. Y. Supp. 644, 890.

¹⁸⁸*Re Evans*, 34 Misc. 37, 69 N. Y. Supp. 487.

¹⁸⁹*Casucci v. Allegany & K. R. Co.* 65 Hun, 452, 29 Abb. N. C. 252, 48 N. Y. S. R. 52, 20 N. Y. Supp. 343. *Contra*, *Kecler v. Kecler*, 51 Hun, 505, 21 N. Y. S. R. 666, 4 N. Y. Supp. 580.

The defendant will be allowed in the discretion of the court to set up in a supplemental answer a settlement made with the plaintiff, and it is no answer to such an application that the attorney for the plaintiff has a lien upon the cause of action.¹⁹⁰

34. Setting aside satisfaction of judgment in courts of record.—

Where the settlement is made after judgment, and the judgment has been satisfied of record, the attorney cannot issue an execution to collect the amount of the alleged lien. He must move to set aside the satisfaction piece;¹⁹¹ or he may maintain an action for that purpose.¹⁹²

The motion to set aside the satisfaction of the judgment is not a motion in the action, but is a special proceeding instituted by third parties upon other issues than those framed in the action and relating to a lien arising out of a state of facts wholly distinct from those passed upon at the trial. An appeal, therefore, lies from the order entered therein to the court of appeals,¹⁹³ which will review the merits of the proceedings, but not the discretion of the court below.

The court, however, will upon such a motion set aside the satisfaction of judgment to the extent of the taxable costs, as they are presumptively the measure of the attorney's rights. If the attorney claims that he has a lien upon the judgment in excess of the taxable costs, the amount must be liquidated in some proper action between the attorney and his client. It cannot be arbitrarily determined upon a motion to vacate the satisfaction entered. The client has the same right to defend against such

¹⁹⁰*Zaitz v. Metropolitan Street R. Co.*, 52 App. Div. 626, 65 N. Y. Supp. 395; *O'Brien v. Metropolitan Street R. Co.*, 27 App. Div. 1, 50 N. Y. Supp. 159. ¹⁹¹*Peri v. New York C. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Foreman v. Edwards*, 14 N. Y. Week. Dig. 408; *Ackerman v. Ackerman*, 14 Abb. Pr. 229.

¹⁹²*Crotty v. McKenzie*, 10 Jones & S. 192; *Albert Palmer Co. v. Van Orden*, 17 Jones & S. 89, 4 N. Y. Civ. Proc. Rep. 44; *Sweet v. Bartlett*, 4 Sandf. 661; *Shaunessy v. Traphagen*, ¹⁹³*Peri v. New York C. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849.

an asserted liability as belongs to him when any other claim is alleged, the amount of which he disputes.¹⁹⁴

It is within the discretion of the court where the lien is obtained, to grant or deny the application of the attorney to set aside a fraudulent satisfaction, or to compel the attorney to bring an action for that purpose. This discretion is subject to no interference by an appellate tribunal.¹⁹⁵

35. Power of justices' courts over satisfaction of judgment.—Section 66 of the Code of Civil Procedure does not apply to justices' courts.¹⁹⁶ Courts of inferior jurisdiction being in many respects enlarged justices' courts, not proceeding according to the course of the common law, but of statutory creation, taking nothing by implication, even if a lien attaches to the judgment, have not the power to set aside a satisfaction of judgment to protect the lien.¹⁹⁷

36. Liability of third party.—A purchaser of real estate is not liable for the amount of an attorney's lien in a condemnation proceeding affecting the land, although as between the attorney and client it had been agreed that the attorney should have a lien on the land for his services.¹⁹⁸

It has been held that an attorney cannot by motion compel the opposite party against whom a verdict has been obtained to pay the amount of his taxed costs and the value of his services, but should bring an action against him, and obtain a decree declaring the judgment subject to the amount found due the attorney.¹⁹⁹

37. Lien of counsel.—Counsel employed by an attorney in the action with the consent of the clients, upon an agreement that

¹⁹⁴*Bailey v. Murphy*, 136 N. Y. 50, 32 N. E. 627, 49 N. Y. S. R. 82.

¹⁹⁵*Howitt v. Merrill*, 113 N. Y. 630.

2 Silv. Ct. App. 158, 20 N. E. 868, 16 N. Y. Civ. Proc. Rep. 374, 22 N. Y. S. R. 619.

¹⁹⁶*Flint v. Van Dusen*, 26 Hun, 606.

¹⁹⁷*People ex rel. Jaffe v. Fitzpatrick*, 35 Misc. 456, 71 N. Y. Supp. 191.

¹⁹⁸*Grigg v. McNulty*, 5 Mi c. 334, 55 N. Y. S. R. 210, 25 N. Y. Supp. 504.

¹⁹⁹*Fox v. Fox*, 24 How. Pr. 409.

they shall be paid out of the proceeds, have an equitable lien upon the proceeds. Where no rate is fixed, the counsel must prove the value of his services by evidence, competent not only against the attorney, but also against the client.²⁰⁰

38. Set-off.—The right of one party to have a judgment set-off against the costs awarded against him was regulated by 2 Rev. Stat. 352, § 18, and Id. 174, § 40. These statutes were repealed by chapter 407 of the Laws of 1877, and the right of counterclaim given by §§ 500 and 501 of the Code of Civil Procedure took their place. Under the Revised Statutes it was held that the lien of the attorney was inferior to the rights of the parties when these rights were asserted in an action, but if it were sought to enforce a set-off by motion, the court could protect the attorney's lien. Since the adoption of the Code of Civil Procedure the decisions are not in harmony, but it may be stated as a general rule that the courts will hold that the lien of the attorney is superior to the right of one party to set off a judgment in one action against costs in another action; but where costs are awarded to both parties in the same action, the equities of the parties are superior to the lien of the attorney, and the costs will be set off one against the other.²⁰¹

This is especially true of interlocutory costs,²⁰² but not costs of special proceedings which originated out of the former actions.²⁰³ One judgment should not be set off against another

²⁰⁰*Harwood v. La Grange*, 137 N. S. 24; *Smith v. Chenoweth*, 14 Daly, Y. 538, 32 N. E. 1000, 50 N. Y. S. R. 166, 18 Abb. N. C. 349, 12 N. Y. Civ. Proc. Rep. 89, 6 N. Y. S. R. 232; 30.

²⁰¹*Winterson v. Hitchings*, 1 N. Y. *Garner v. Gladwin*, 12 N. Y. Week. Anno. Cas. 193, 73 N. Y. S. R. 360, Dig. 9; *Sanders v. Gillett*, 8 Daly, 38 N. Y. Supp. 171; *Fromme v.* 183; *Kaufman v. Keenan*, 13 N. Y. *Gray*, 17 Misc. 77, 39 N. Y. Supp. Civ. Proc. Rep. 225; *Horey v. Rubber Tip Pencil Co.* 14 Abb. Pr. N. S. Cas. 192, 72 N. Y. S. R. 804, 38 N. 66.

Y. Supp. 176; *Hoyt v. Godfrey*, 11 ²⁰²*Hoyt v. Godfrey*, 11 Daly, 278, Daly, 278; *Davidson v. Alfaro*, 80 N. 3 N. Y. Civ. Proc. Rep. 118, 16 N. Y. 660; *Warden v. Frost*, 35 Hun, Y. Week. Dig. 91; *Catlin v. Adirondack Co.* 22 Hun. 493.

N. Y. Week. Dig. 442, 8 N. Y. S. R. ²⁰³*Gibbs v. Prindle*, 11 App. Div.

judgment between the same parties where one is for costs only.²⁰⁴ The court will not entertain such a motion where the costs in one action have not been taxed.²⁰⁵ The courts will not set off against a judgment, a claim not reduced to judgment.²⁰⁶ Pending an appeal a judgment is suspended and cannot be made subject of a set-off.²⁰⁷

It has been held that where the defendant obtained costs upon an appeal from an order they would not be set off against a judgment for damages and costs recovered by plaintiff in the same action.²⁰⁸

The same court composed of the same judges, however, decided that the defendant's costs after an offer of judgment were properly set off against the general verdict for the plaintiff.²⁰⁹

A party can assign to his attorney costs to accrue, and the equities of the attorney will be superior to those of the opposite party to have these costs set off against a claim not arising out of the same transaction.²¹⁰

The right of the attorney thus acquired is not only superior to those of the opposite party, but also to those of his surety.²¹¹

470, 42 N. Y. Supp. 329; *Re Havemeyer*, 27 App. Div. 123. 50 N. Y. Supp. 126.

²⁰⁴*Carleton v. Goldman*, 5 N. Y. Civ. Proc. Rep. 153; *Linderman v. Foote*, 5 N. Y. Civ. Proc. Rep. 154.

note; *Turno v. Parks*, 2 How. Pr. N. S. 35; *Naylor v. Lane*, 5 N. Y. Civ. Proc. Rep. 149, 18 Jones & S. 97, 66 How. Pr. 400.

²⁰⁵*Moloughney v. Karanagh*, 3 N. Y. Civ. Proc. Rep. 253. 16 N. Y. Week. Dig. 253.

²⁰⁶*Husted v. Thomson*, 26 Misc. 548, 57 N. Y. Supp. 558.

²⁰⁷*Hardt v. Schulting*, 12 N. Y. Week. Dig. 27.

²⁰⁸*Tunstall v. Winton*, 31 Hun. 219, 5 Month. L. Bull. 42 (this case has been erroneously said to have been affirmed by the court of appeals. That court affirmed a case with the same title reported at another place

in 31 Hun); *Place v. Hayward*, 8 N. Y. Civ. Proc. Rep. 352. 3 How. Pr. N. S. 59; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Naylor v. Lane*, 5 N. Y. Civ. Proc. Rep. 149.

²⁰⁹*Garner v. Gladwin*, 12 N. Y. Week. Dig. 9; *Bulkley v. Back*, 22 Jones & S. 300.

²¹⁰*Zogbaum v. Parker*, 55 N. Y. 120; *Perry v. Chester*, 53 N. Y. 240; *Ely v. Cooke*, 28 N. Y. 365, 2 Abb. App. Dec. 14; *Firmenich v. Borce*, 1 Hun, 532, 4 Thomp. & C. 98; *Hayes v. Carr*, 28 N. Y. Week. Dig. 104, 12 N. Y. S. R. 584; *Davidson v. Alfaro*, 80 N. Y. 660; *Palmer v. Palmer*, 24 Misc. 217, 53 N. Y. Supp. 538; *Swift v. Prouty*, 6 Hun, 94. *Contra*, *Dingee v. Shears*, 29 Hun, 210.

²¹¹*Channing v. Moore*, 13 N. Y. Civ. Proc. Rep. 349, 13 N. Y. S. R. 715, 11 N. Y. S. R. 670.

If the attorney takes an assignment of the judgment, he takes it subject to all the equities that existed against his assignor.²¹²

Motion costs which are not collected at the time of the entry of final judgment may be set off against costs awarded to an adverse party.²¹³ This provision relates to references arising under § 1015 of the Code of Civil Procedure.²¹⁴

39. Lien in matrimonial actions.— The attorney's lien will be protected in these actions as well as in any other action.²¹⁵ But the courts will not allow the lien of the attorney to stand in the way of a settlement of the action by the parties. They will not allow the attorney to proceed with the action for the purpose of protecting his lien. He will be remitted to the ordinary methods of collecting whatever costs or allowances for counsel fees have been made in the action.²¹⁶

No lien will attach to alimony as such, but only to costs as such, and allowances made by the court. An agreement by the wife to pay her attorney a certain portion of the allowance to her of alimony is void as against public policy, and an order authorizing a partial compliance therewith will be set aside.²¹⁷

An attorney has not a lien upon the money of the husband held by the court as security for the payment of future alimony, although it represents real estate, and the wife has an inchoate right of dower therein.²¹⁸ Where a wife has settled with the husband, and has consented to a decree vacating a warrant of

²¹²*Davidson v. Alfaro*, 80 N. Y. Proc. Rep. 28, 32 N. Y. S. R. 979, 10 660; *Hayden v. McDermott*, 9 Abb. N. Y. Supp. 638; *Weill v. Weill*, 18 Pr. 14; *MacWhinnie v. Cameron*, 57 N. Y. Civ. Proc. Rep. 241, 10 N. Y. Hun. 463, 19 N. Y. Civ. Proc. Rep. Supp. 627. *Contra, Robertson v. 168*, 32 N. Y. S. R. 985, 11 N. Y. *Robertson*, 1 Month. L. Bull. 85. Supp. 20.

²¹³Code Civ. Proc. § 779.

²¹⁴*Jones v. Easton*, 11 Abb. N. C. 114.

²¹⁵*Branth v. Branth*, 19 N. Y. Civ. Proc. Rep. 28, 32 N. Y. S. R. 979, 10 N. Y. Supp. 638.

²¹⁶*Kirby v. Kirby*, 1 Paige, 565; *Branth v. Branth*, 19 N. Y. Civ.

²¹⁷*Van Fleck v. Van Fleck*, 21 App. Div. 272, 47 N. Y. Supp. 470, 21 App. Div. 631, 47 N. Y. Supp. 472; *Re Bolles*, 78 App. Div. 180, 79 N. Y. Supp. 530.

²¹⁸*Mooney v. Mooney*, 29 Misc. 707, 7 N. Y. Anno. Cas. 257, 62 N. Y. Supp. 769.

commitment to enforce the collection of alimony and counsel fees allowed by the court, the attorney cannot maintain the commitment proceedings, to collect costs and counsel fees exclusively.²¹⁹

It has been held at special term that the attorney cannot collect costs and allowances by contempt proceedings, but that he is confined to issuing an execution to collect them.²²⁰

The wife cannot deprive the attorney of the husband of costs that have been awarded against the wife upon her unsuccessful attempt to collect alimony, by offsetting the costs against the alimony unpaid.²²¹

²¹⁹*Branth v. Branth*, 19 N. Y. Civ. Proc. Rep. 241, 10 N. Y. Supp. 627. Proc. Rep. 28, 32 N. Y. S. R. 979, 10 N. Y. Supp. 638.

²²¹*Winton v. Winton*, 18 N. Y. Civ. Proc. Rep. 67, 13 N. Y. Supp. 759.

²²⁰*Weill v. Weill*, 18 N. Y. Civ.

CHAPTER III.

LIABILITY OF ATTORNEY.

40. By summary proceeding instituted by his client.
 - a. In general.
 - b. How exercised.
 - c. Between what parties.
 - d. How instituted.
 - e. In what cases.
 - f. Effect upon this proceeding of an action brought for the same thing.
 - g. Answer of attorney to this proceeding.
41. By action in tort brought by client.
42. Liability for interest on money collected by attorney.
43. Rights of attorney to have his lien determined.
44. Liability for misconduct.
45. Liability of attorney for sheriff's fees.
46. Liability for other fees.
47. Repayment of costs.

40. By summary proceeding instituted by his client.—*a. In general.*—Where the attorney and his client cannot agree upon the amount of the lien of the attorney, the client may sue his attorney if he claims to retain money collected as a compensation for his services, or he may have the court decide in a summary proceeding the rights of the parties to the fund. This latter proceeding can also be instituted to determine the amount of the attorney's lien at any time. The client has no absolute legal right to institute this proceeding. It rests in the discretion of the court to decide when it will entertain it.¹

The courts have power over the conduct of attorneys as officers of the court to regulate the manner in which the attorneys shall exercise their calling.

¹*Kecney v. Tredwell*, 71 App. Div. 521, 75 N. Y. Supp. 1097.

In 1895 it was held that the New York city court, formerly the marine court, had such power.² This power it can use in a summary manner.³ Where an attorney has received money of his client and refuses to pay it over, the court will exercise this power and order him to pay it over, allowing him to retain the amount due from the client to him. The parties are not entitled to a jury trial to determine the amount of his claim.⁴

Before the amendment of § 66 of the Code of Civil Procedure by chapter 61, Laws of 1899, it had been uniformly held that the amount of an attorney's lien could only be determined upon an application to the court upon the part of the client, and that an attorney could not enforce his lien in this summary manner.⁵

Since the amendment, however, the court can determine the amount of the lien upon the application of the attorney or of the client.⁶

The client is entitled to settlements from time to time as payments are made, where the attorney is receiving money in instalments, and may invoke summary proceedings to compel the attorney to turn over the money then due the client.⁷

b. How exercised.—The court may institute inquiries itself upon affidavits or upon examination of witnesses, or may order a reference to ascertain the amount due the attorney, if there is any dispute as to the amount, or a dispute as to any other material fact.⁸ Such a reference cannot be terminated by notice un-

²*Gillespie v. Mulholland*, 12 Misc. 387, 72 N. Y. S. R. 617, 37 N. Y. 40, 33 N. Y. Supp. 33. ³Supp. 291; *Ogden v. Derlin*, 13

⁴*Re Knapp*, 85 N. Y. 284; *Ex parte Jones & S.* 631. ⁵*Re Lexington Ave.* 30 App. Div.

⁶*Re Fincke*, 6 Daly. 111; *Brown v.* 602, 52 N. Y. Supp. 203; *Griggs v. New York*, 9 Hun, 587; *Ackerman v. Brooks*, 79 Hun, 394, 61 N. Y. S. R. 499, 29 N. Y. Supp. 794.

Ackerman, 14 Abb. Pr. 229; *Coster v. Greenpoint Ferry Co.* 5 N. Y. Civ. Proc. Rep. 146; *Porter v. Parmly*, 7 Div. 408, 71 N. Y. Supp. 559.

Jones & S. 219; *Canary v. Russell*, 10 Misc. 597, 24 N. Y. Civ. Proc. Rep. Y. S. R. 219, 37 N. Y. Supp. 65. Affirmed without opinion in 149 N. Y. Supp. 291; *Amsdell v. Martin*, 20 N. 608, 44 N. E. 1129.

Y. Week. Dig. 370; *Philadelphia v. Re Fincke*, 6 Daly. 111; *Bowling Postal Teleg. Cable Co.* 1 App. Div. *Green Sav. Bank v. Todd*, 52 N. Y.

der § 1019 of the Code of Civil Procedure.⁹ Where it appears just what the attorney has done and what he has retained there is no need of a reference.¹⁰ Where all the facts are before the court and it passes upon the questions involved at the invitation of the parties, neither can claim that the court should have ascertained the facts by a reference or otherwise.¹¹ But where there is a dispute as to material facts, or where the attorney alleges that he has a lien upon the matter in dispute, or denies a material allegation, that the petitioner has alleged, the court cannot make an order on the papers, but must make inquiry itself, or send it to a referee.¹²

Upon the determination of the amount due, a judgment may be awarded to the successful party.¹³

In such a proceeding the court should aim to do justice, and should not be bound by technical rules. The attorney should be allowed to give evidence which in an action would be prohibited by § 829 of the Code of Civil Procedure; also either party should be permitted to contradict written instruments by parol evidence.¹⁴

c. Between what parties.—The court will never exercise this power where the client has assigned his cause of action, or judgment, because the relation of attorney and client does not exist, and only a contract relation exists between the attorney and the

489; *Re H.* 87 N. Y. 521, 63 How. Pr. 152, 14 N. Y. Week. Dig. 259; ¹¹*Re Borkstrom*, 63 App. Div. 7, 71 N. Y. Supp. 451.

Re Ernst, 54 App. Div. 363, 66 N. Y. Supp. 620; *Porter v. Parmly*, 7 Jones & S. 219; *Re Peterson*, 74 Hun, 93. ¹²*Griggs v. Brooks*, 79 Hun, 394, 61 N. Y. S. R. 499, 29 N. Y. Supp. 794;

26 N. Y. Supp. 405. ¹³*Austin v. Rawdon*, 42 N. Y. 155; *Greenfield v. New York*, 28 Hun, 320; General Rule 27. *Contra*, *Ward v. Ward*, 67 App. Div. 121, 73 N. Y. Supp. 450; *Myer v. Abbott*, 20 App. Div. 390, 46 N. Y. Supp. 822.

¹⁴*Bennett v. Pittman*, 48 Hun, 612, 21 Abb. N. C. 238, 28 N. Y. Week. Dig. 437, 15 N. Y. S. R. 976, 1 N. Y. Supp. 27. ¹⁵*Purdy v. Stewart*, 16 N. Y. Week. Dig. 284.

¹⁶*Ferdon v. Harrigan*, 71 N. Y. S. R. 671, 36 N. Y. Supp. 741; *Re Mer- tian*, 16 N. Y. Week. Dig. 554, 29 Hun, 459; *Re Kuapp*, 85 N. Y. 284, 12 N. Y. Week. Dig. 391.

assignee.¹⁵ An attorney has been ordered to pay into court a sum of money which he had received for a deceased client, upon an application by the personal representatives of such client.¹⁶

The client need not proceed against all the members of a firm of attorneys, when one of the members took a check in the firm's name and misappropriated the funds, but he may proceed against the member guilty of the wrong.¹⁷

d. How instituted.—This proceeding is instituted by a petition which should be verified by the petitioner, and the fact that the petitioner is a resident of a neighboring state and is absent from the state of New York does not relieve him from the necessity of verifying the petition, nor authorize its verification by an attorney.¹⁸

e. In what cases.—The court will not entertain this proceeding unless the money or property has come into the hands of the attorney as an attorney at law. Where it has come into his hands under an agreement for services which a layman might have performed, this proceeding will not be entertained,¹⁹ or where the client has loaned money to the attorney, and the attorney has obtained a discharge of a mortgage given as security by promises which he did not fulfil,²⁰ or where an insurance policy has been received by an attorney, not in his professional capacity, but as mere agent,²¹ or where an attorney not in active prac-

¹⁵*Re Schell*, 58 Hun, 440, 34 N. Y. S. R. 928, 12 N. Y. Supp. 790. Appeal dismissed in 128 N. Y. 67, 38 N. Y. S. R. 442, 27 N. E. 957; *Hexter v. Pennsylvania R. Co.* 43 App. Div. 113, 59 N. Y. Supp. 453; *Hess v. Joseph*, 7 Robt. 609; *Bowen v. Smidt*, 49 N. Y. S. R. 647, 20 N. Y. Supp. 735. *Contra*, *Gillespie v. Mulholland*, 12 Misc. 49, 33 N. Y. Supp. 33, citing *Schell v. New York*, 128 N. Y. 67, 27 N. E. 957; *Re Redmond*, 54 App. Div. 454, 66 N. Y. Supp. 782. *Obiter*, same court that decided *Hexter v. Pennsylvania R. Co.* 43 App. Div. 113, 59 N. Y. Supp. 453.

¹⁶*Baker v. Brown*, 150 N. Y. 567, 44 N. E. 1120.

¹⁷*Re Wolf*, 51 Hun, 407, 21 N. Y. S. R. 224, 4 N. Y. Supp. 239.

¹⁸*Re Curtis*, 51 App. Div. 434, 64 N. Y. Supp. 691.

¹⁹*Re Curtis*, 51 App. Div. 434, 64 N. Y. Supp. 691; *Re Dakin*, 4 Hill. 42; *Re Hillebrandt*, 33 App. Div. 191, 53 N. Y. Supp. 352.

²⁰*Re Hasson*, 26 Hun, 130, 62 How. Pr. 358.

²¹*Re H.* 87 N. Y. 521, 63 How. Pr. 152, 14 N. Y. Week. Dig. 259.

rice collected on a life insurance policy money which he did not turn over,²² or where an attorney has collected from his client the compensation for himself and counsel, and refuses to pay the counsel his share.²³

Where an attorney has paid part of the costs over to counsel, and the court has subsequently ordered that the attorney return the costs to his client, the attorney cannot compel the counsel to refund the money by summary proceedings.²⁴

f. Effect upon this proceeding of an action brought for the same thing.—The attorney will not be ordered to pay over money received in his official capacity from his client where there is an action pending between them in relation thereto, and the client has treated with the attorney as an adverse party.²⁵ If the bringing of an action is not an absolute bar it is a matter that the court should take into consideration in exercising its discretion;²⁶ but the fact that the client has reduced his claim against his attorney to judgment is not a bar to a summary proceeding to compel the attorney to pay.²⁷ But the client's accepting the attorney's note for the amount of money belonging to the client, which the attorney cannot pay, is a bar to summary proceedings instituted by the client upon the nonpayment of the note at its maturity.²⁸

g. Answer of attorney to this proceeding.—An attorney who has received money from the committee of a lunatic for safe keeping will not be ordered to pay the money over to the administrator of the lunatic, where the accounts of the committee, who is dead, have not been settled.²⁹ It is no answer to these proceedings that the attorney made his claim in good faith.³⁰

²²*Re Hillebrandt*, 33 App. Div. 191, 6 N. Y. Anno. Cas. 1, 52 N. Y. Supp. 1127.

²³*Re Hashin*, 18 Hun. 42.

²⁴*Taylor v. Long Island R. Co.*, 38 App. Div. 595, 56 N. Y. Supp. 665.

²⁵*Harris v. Elliott*, 19 App. Div. 60, 45 N. Y. Supp. 916.

²⁶*Re Mott*, 36 Hun. 569.

²⁷*Gabriel v. Schillinger Fire Proof Cement & Asphalt Co.*, 24 Misc. 313.

²⁸*Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489.

²⁹*Re Accille*, 71 App. Div. 192, 75 N. Y. Supp. 588.

³⁰*Re Redmond*, 54 App. Div. 454, 8 N. Y. Anno. Cas. 309, 66 N. Y. Supp. 782; *Re Bleakley*, 5 Paige-311.

The court will not allow an attorney to retain his client's money for what seems to it excessive charges where there is no evidence of their legal value, nor necessity thereof except the attorney's testimony. The attorney should produce experts upon these questions.³¹ Where the rate of compensation is not fixed, the attorney must establish the value of his services by evidence that would be competent in an action brought by the attorney against his client to recover the value of such services.³² He must show in detail his services and disbursements.³³

Attorneys in such a proceeding cannot set up the fact that they never actually received the money of their client, when they have assumed control of it, and directed the custodian to pay it to a creditor of the attorneys.³⁴

The client should take proceedings in the actions in which the attorney received the money sought to be recovered, and not in an action in which judgment has been taken against the attorneys.³⁵

41. By action in tort brought by client.— To maintain an action for conversion against an attorney for money that has rightfully come into his possession and upon which he has a lien for his services, the client must prove that the amount due the attorney has been actually paid or tendered to him before the action was commenced.³⁶

In such an action the allegation that the attorney claims a lien upon the money received is not a counterclaim, requiring a reply, but is a defense which must be proved. His defense is his claim for services, but his lien is something different.³⁷

42. Liability for interest on money collected by attorney.—

³¹*Re Raby*, 25 Misc. 240, 55 N. Y. Supp. 87.

³²*Harwood v. La Grange*, 137 N. Y. 538, 32 N. E. 1000.

³³*Re Ernst*, 54 App. Div. 363, 66 N. Y. Supp. 620.

³⁴*Kent v. Rockwell*, 89 Hun, 88, 69 N. Y. S. R. 13, 34 N. Y. Supp. 1041.

³⁵*Grangier v. Hughes*, 24 Jones & S. 346, 3 N. Y. Supp. 828.

³⁶*Gunning v. Quinn*, 81 Hun, 522, 63 N. Y. S. R. 209, 30 N. Y. Supp. 1015.

³⁷*Rochester Distilling Co. v. O'Brien*, 72 Hun, 462, 25 N. Y. S. R. 149, 25 N. Y. Supp. 281.

In an action brought against an attorney to recover the amount of a judgment received by him, and which he claimed to hold as payment for his services in the action, it was held that the attorney was entitled to his compensation when he collected the money upon the judgment, and interest should be charged against the attorney from the date of the receipt of the money, less his charges, and that the attorney could not be allowed interest upon the taxable costs and disbursements until his employment closed, *i. e.*, the date that he collected the money on the judgment.³⁸

Interest cannot be allowed upon the amount that an attorney has received after deducting the amount of his services, where the amount due the attorney was not liquidated, as it is as much the client's business to settle the matter as the attorney's.³⁹

43. Rights of attorney to have his lien determined.—Whenever the client or any person claiming under him seeks to obtain the property upon which the attorney claims a lien, the attorney is entitled to have his lien ascertained and paid before surrendering the property. It makes no difference in what form of proceeding the client asserts his rights.⁴⁰

44. Liability for misconduct.—The court will proceed to punish an attorney for contempt where he has paid to his client the money received upon a settlement of an action, in violation of the order of the court made upon substituting the present attorney for the original attorney, which order contained a provision that the original attorney should have a lien on the cause of action for his compensation.⁴¹ An attorney will be compelled to pay the costs of a reference ordered to ascertain the residence of his

³⁸*Hover v. Heath*, 3 Hun, 283, 5 *Re Holland Trust Co.* 76 Hun, 325, Thomp. & C. 488. 59 N. Y. S. R. 85, 27 N. Y. Supp.

³⁹*Maxwell v. Cottle*, 72 Hun, 529, 687. 55 N. Y. S. R. 127, 25 N. Y. Supp. ⁴⁰*Re Wolf*, 51 Hun, 407, 21 N. Y. 635; *Re Knapp*, 85 N. Y. 284; *Re H.* S. R. 224, 4 N. Y. Supp. 239; *Hussey* 87 N. Y. 521; *McKibbin v. Vafis*, 76 *v. Culver*, 30 N. Y. S. R. 836, 9 N. Y. Hun, 344, 59 N. Y. S. R. 101, 27 N. Supp. 193, Affirmed in 130 N. Y. 681, Y. Supp. 723; *Taylor Iron & Steel* 29 N. E. 1035.

Co. v. Higgins, 66 Hun, 626, 49 N. ⁴¹*Hammond v. Dean*, 4 Hun, 131, Y. S. R. 645, 20 N. Y. Supp. 746; 6 Thomp. & C. 337.

client, where the attorney has not dealt with the court without reserve, but has suppressed important facts for the purpose of screening his client.⁴² An attorney will be compelled to pay costs of appeals, which he takes without authority.⁴³

45. Liability of attorney for sheriff's fees.—The liability of an attorney for disbursements (with the exception of official fees) is the same as that of any other agent in regard to disbursements made in his principal's business. An attorney is liable to clerks, sheriffs, and other similar officers for services rendered in an action at the request of the attorney.⁴⁴

An attorney is also liable for the fees of the sheriff upon an execution issued by him for his client. This was decided nearly a century ago.⁴⁵ The courts have long doubted whether this rule could be maintained upon principle or is consistent with the general current of judicial authority elsewhere, and refuse to extend the rule by analogy to other matters, such as referee's fees.⁴⁶ It is still upheld upon the ground that it has been the law of the state for a long time and no practical injustice results from enforcing it. But an attorney is not liable to the sheriff for his fees upon an execution unless he or his client has hindered the sheriff in the collection of the full amount. The reduction of the amount of the judgment by the court is no fault of the attorney and he is not liable for the fees of the sheriff upon the whole amount of the judgment.⁴⁷ Nor is the assignment of the judgment, where no directions are given not to collect the judgment, such an interference with the execution that the attorney will be liable for sheriff's fees. It is only when the judgment itself is satisfied or discharged, or the attorney has countermanded the execution, that the sheriff may look to the attorney for his fees.⁴⁸

⁴²*Baur v. Betz*, 7 N. Y. Civ. Proc. Rep. 233, 1 How. Pr. N. S. 344.

⁴⁶*Judson v. Gray*, 11 N. Y. 408.

⁴⁵*Campbell v. Cothran*, 56 N. Y.

⁴³*Struppmann v. Muller*, 55 How. 279.

Pr. 427, 11 Jones & S. 38.

⁴⁸*Van Kirk v. Sedgwick*, 87 N. Y.

⁴⁴*Bonyng v. Waterbury*, 12 Hun. 265, 534.

⁴⁵*Adams v. Hopkins*, 5 Johns. 252;

Ousterhout v. Day, 9 Johns. 114.

It is no defense in an action brought by a sheriff for his fees against the attorney, who has directed him not to sell under an execution, to show that the property would not have brought as much as the execution called for. The attorney is liable for the sheriff's fees upon the whole amount.⁴⁹

An attorney is not liable to the sheriff for his fees on a body execution while the debtor is still in custody. It is doubtful whether he is liable until the money is collected.⁵⁰

An attorney who places a cause on the calendar is liable to the sheriff for his calendar fees.⁵¹ But it must be shown by some evidence other than the calendar that the attorney filed the note of issue.⁵²

46. Liability for other fees.— An attorney has been held not liable for the fees of a stenographer employed by him to take the testimony in an action,⁵³ nor for the bill for a copy of the testimony,⁵⁴ nor for the fees of a commissioner in partition as fixed in § 3299 of the Code of Civil Procedure,⁵⁵ nor for the fees of an expert accountant employed to examine the books of account in preparation for trial,⁵⁶ nor for printing a brief.⁵⁷ But where he does not disclose the name of his client he is personally liable.⁵⁸

The attorney can, of course, make himself liable for any or all of these charges when he contracts them in his own name.⁵⁹ He is not liable for referee's fees,⁶⁰ nor for the fees of counsel.⁶¹

⁴⁹*Parsons v. Bordoin*, 17 Wend. 14.

⁵⁰*Good v. Rumsey*, 50 App. Div.

⁵¹*Bove v. Campbell*, 2 N. Y. Civ. 280, 63 N. Y. Supp. 981.
Proc. Rep. 232, 63 How. Pr. 167.

⁵²*Reilly v. Tullis*, 10 Daly, 283.

⁵³*Reilly v. Flynn*, 10 Daly, 462.

⁵⁴*Bonyuge v. Waterbury*, 12 Hun. 334; *Bonyuge v. Field*, 81 N. Y. 159.

⁵⁵*Sheridan v. Genet*, 12 Hun. 660.

⁵⁶*Lamoreux v. Morris*, 4 How. Pr. 124.
245.

⁵⁷*Correll v. Hart*, 14 Hun. 252.

⁵⁸*Livingston-Middleitch Co. v. New York College of Dentistry*, 31 Misc. 259, 64 N. Y. Supp. 140.

⁵⁹*Gray v. Journal of Finance Pub. Co.*, 2 Misc. 260, 50 N. Y. S. R. 764.

21 N. Y. Supp. 967; *Press Pub. Co. v. Baker*, 36 N. Y. S. R. 879, 13 N. Y. Supp. 822.

⁶⁰*Dinkel v. Wehle*, 11 Abb. N. C.

⁶¹*Macniffe v. Ludington*, 13 Abl. N. C. 407.

47. Repayment of costs.—Where a party has collected costs of the opposite party either personally or by his attorney, and the money thus collected has been turned over to the attorney, either for services in that action or for services generally^{61a} or money has been received under an order and a like disposition has been made of it,⁶² an action will not lie against the attorney to recover the money thus paid upon the reversal of the judgment or order. But where the money has been obtained by the attorney by any fraud practised, the court can make the attorney refund the money thus collected, unless it appears that he has paid it to his client.

Money paid by the defendant to the plaintiff's attorney, and applied by the latter upon the indebtedness due him from his client, may be recovered from the attorney, when the defendant has been induced by the fraud of the plaintiff to settle the action.⁶³ If the money had been paid to the plaintiff and he in turn had paid the money to his attorney, the latter could not have been compelled to return it.⁶⁴

The attorney will be compelled to return costs that have been improperly allowed,^{64a} unless it appears that he has paid them to his client.^{64b}

An attorney who has rendered services for an executor, and who has been paid for his services from the funds of the estate, will not be compelled to refund the money thus received, when it is subsequently decided that the will is invalid, and the executor is unable to refund the money thus expended by him.⁶⁵

^{61a}*Langley v. Warner*, 3 N. Y. 327; *Fowler*, 14 Abb. Pr. N. S. 249, *Rear-Butcher v. Henning*, 90 Hun. 565, 35 N. Y. Supp. 1006; *Simpson v. Hornbeck*, 3 Lans. 53; *Wright v. Nostrand*, 21 Jones & S. 381.

⁶²*Re White*, 82 App. Div. 553, 81 N. Y. Supp. 858; *Grauer v. Grauer*, 2 Misc. 98, 20 N. Y. Supp. 854, 49 N. Y. S. R. 354.

⁶³*Forstman v. Schulting*, 108 N. Y. 110, 15 N. E. 366; *Wilmerdings v.*

firmed on appeal in 55 N. Y. 641.

⁶⁴*Fischer v. Burns*, 61 N. Y. S. R. 476, 30 N. Y. Supp. 437.

^{64a}*Cooper v. Cooper*, 27 Misc. 595, 59 N. Y. Supp. 86.

^{64b}*Forstman v. Schulting*, 108 N. Y. 110, 15 N. E. 366.

⁶⁵*Shaffer v. Bacon*, 35 App. Div. 248, 54 N. Y. Supp. 796.

Where a party to an action settles the same by paying the amount of the damages claimed, together with the alleged costs, and it is discovered that he has paid too much costs, an action will lie to recover back the amount of the excess costs thus paid, and the action may be brought in a court other than the one in which the action was pending in which the excess costs were paid.⁶⁶

The court has power under § 1323 of the Code of Civil Procedure to compel a party to return costs that have been paid to his attorney under a judgment which has been reversed or modified. The court of original jurisdiction has this power, but it is doubtful whether the appellate court has such power.⁶⁷

⁶⁶*Britton v. Frink*, 3 How. Pr. 102; ⁶⁷*Wright v. Nostrand*, 21 Jones & Clinton v. Strong, 9 Johns. 370; S. 381.
Ripley v. Gelston, 9 Johns. 201, 6
Am. Dec. 271; *Wisner v. Bulkley*, 15
Wend. 321.

CHAPTER IV.

MOTIONS AND AMENDMENTS.

48. Motion costs.
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48. Motion costs. *a. In general.*—A notice of motion cannot be withdrawn or countermanded before argument. The party opposing the motion may attend to argue the motion and obtain an order denying the motion by default, but the costs of such motion are in the discretion of the court. In the New York superior court the rule was established that a notice of motion could not be countermanded or withdrawn without the payment of costs. But where the motion embraced two distinct matters one could be withdrawn without the payment of costs.¹ Before the adoption of the Code of Procedure costs were allowed to the party who attended court prepared to oppose a motion and the moving party did not appear.²

b. Amount.—The amount of costs allowed on a motion is regulated by § 3251 of the Code of Civil Procedure, which fixes the sum at "not exceeding ten dollars besides necessary disbursements for printing and referee's fees," except a motion for a new trial upon a case, or an application for judgment upon a special verdict where the amount is the same as upon an appeal as prescribed in subdivision 4 of that section, *i. e.* \$60.³ The costs allowed on special verdict apply only to actions at law.⁴

c. How awarded.—Costs upon a motion, unless specially regulated by statute, may be awarded, either absolutely or to abide the event of the action, to any party, in the discretion of the court or judge.⁵ Motion costs are discretionary. This discretion is not to be exercised arbitrarily, but in reference to the

¹*Walkinshaw v. Perzel*, 7 Robt. Bowery Sav. Bank, 9 N. Y. Civ. Proc. 606, 32 How. Pr. 310. Rep. 177; *Re Owens*, 31 Abb. N. C.

²*Brett v. Hood*, 1 Cai. 343, Coleman & C. Cas. 259; *Lounsbury v. Rathbone*, 1 Wend. 283. 480, 62 N. Y. S. R. 107, 30 N. Y. Supp. 348.

³*Kennedy v. First Nat. Bank*, 8 N. Y. Civ. Proc. Rep. 398; *Walsh v.* ⁴*Arctage v. Lee*, 5 Month. L. Bull. 65.

⁵Code Civ. Proc. § 3236.

justice of the case, and what has been the usage of the courts in similar cases.⁶

d. When awarded.—A party is not entitled to motion costs unless they are allowed in the order granted upon the motion.⁷

They are not allowed unless the motion is necessary for the attainment of some substantial right in the case, except where they are awarded as punishment to the opposite party.⁸

Thus, a moving party will be charged with the costs of a motion, where otherwise he would not, if he asks in his moving papers for costs against his opponent without any foundation for it.⁹ Costs will be allowed upon a motion to strike out improper costs taxed in a bill of costs.¹⁰

e. When refused. (1) *In general.*—Costs will be refused to the party who succeeds upon the motion, when his actions have induced or compelled the opposite party to make the motion,¹¹ or when he has refused to the moving party the relief asked in the moving papers, upon being tendered all that he is entitled to.¹² Upon a default a party cannot insert in his order more than he has asked in his notice of motion. If he has not asked for costs he cannot insert them in the order—payable absolutely to the moving party,¹³ or to abide the event of the action, although he asks in his notice of motion “for such other and further rule or order in the premises as the court may deem proper to grant.”¹⁴ But motion costs may be granted upon a contested motion, although no costs were asked in the notice of motion.¹⁵ A motion for a compulsory reference to hear, try, and determine should not

⁶*Stiles v. Fisher*, 3 How. Pr. 52.

¹¹*Leonard v. Manard*, 1 Hall, 200.

⁷*Chadwick v. Brother*, 4 How. Pr.

¹²*Gaul v. Miller*, 3 Paige, 192;

283, 3 N. Y. Code Rep. 21; *Morrison*

v. Ide, 4 How. Pr. 304, 3 N. Y. Code

Rep. 27.

Kane v. Van Vranken, 5 Paige, 62;

Bell v. Judson, 2 How. Pr. 42.

¹³*Crippen v. Ingersoll*, 10 Wend.

603; *Smith v. Fleischman*, 17 App.

⁸*Jacobs v. Hooker*, 1 Barb. 71.

⁹*Burroughs v. Reiger*, 12 How. Pr.

170.

¹⁴*Northrop v. Van Dusen*, 5 How.

Pr. 134, 3 N. Y. Code Rep. 140.

¹⁰*Bowne v. Anthony*, 13 How. Pr.

301.

¹⁵*Jones v. Cook*, 11 Hun. 230.

be granted with costs. At most the costs should be made to abide the event.¹⁶

(2) *Both succeed in part*.—It is a general rule that where costs are in the discretion of the court, they will not be allowed where both parties succeed in part. If costs depended upon the success of the issue, both having succeeded, costs should be granted to both, and thus they would balance. This rule applies to motion costs.

A moving party will not be allowed costs where he obtains less than what he asked in his notice of motion.¹⁷

If the moving party asks for the costs of a motion when he is not entitled to them, and upon the argument he obtains all that he asks for, except the costs, he will be denied costs. The opposite party would be entitled to costs if he had limited his opposition simply to the allowance of costs, as in that event he would succeed wholly, but where he argues the case on the merits and is defeated upon that part of the motion, he cannot be allowed costs. In the latter event neither party would be allowed costs, as each succeeds in part.¹⁸

(3) *Costs balance*.—Costs will not be allowed to either party where two separate motions in the same case are argued at the same time, and each party succeeds wholly upon one motion, because the costs balance each other.¹⁹

(4) *Unnecessary motion*.—Costs will be refused where a party has compelled his opponent to make a motion after he is offered all that he is entitled to, as where a defendant offers motion costs for the privilege of amending his answer.²⁰ Costs will be granted to the party moving for discovery and inspection of

¹⁶*Cuthbert v. Hutchins*, 7 App. Div. 251, 48 N. Y. Supp. 277.

¹⁸*Noxon v. Gregory*, 5 How. Pr. 339; *Weeks v. Southwick*, 12 How.

¹⁷*McKenzie v. Hackstaff*, 2 E. D.

Pr. 171.

Smith, 75; *Whipple v. Williams*, 4

How. Pr. 28; *Bates v. Loomis*, 5

¹⁹*Ward v. Sands*, 10 Abb. N. C. 60,

Wend. 78; *Corbin v. George*, 2 Abb.

Pr. 465; *Steam Navigation Co. v.*

Weed, 8 How. Pr. 50; *Penfield v.*

White, 8 How. Pr. 88.

²⁰*Bell v. Judson*, 2 How. Pr. 42.

papers if a request to inspect them has been unreasonably refused.²¹ Or where pleadings, not having been properly subscribed, have been returned for that reason, and the attorney refuses to receive them after they are corrected, together with the costs of a motion.²²

Costs were held to abide the event where the party was offered the relief asked for and \$5 for drawing the papers, which was refused. Motion costs are intended not only to pay for arguing a motion, but also for drawing the papers.²³

(5) *Ex parte motions*.—Costs will not be granted on *ex parte* motions.²⁴

f. Same motion in several cases.—Costs of only one motion will be allowed where the moving party could have united the motions in all cases in one motion.²⁵ Cost of but one motion can be allowed, where there has been a series of orders so connected that if one is erroneous all are.²⁶

Costs of but one motion can be allowed although separate attorneys appear for different parties upon the argument.²⁷

g. Relief asked in motion granted by opposite party before argument.—Costs of motion were allowed under the Code of Procedure although, after the service of a notice of motion founded on an irregularity in the complaint, an amended complaint was served which obviated the irregularity, as the motion was a proceeding already had under § 172 of the Code of Procedure.²⁸

The contrary has been held under the Code of Civil Procedure.²⁹

²¹*Brevoort v. Warner*, 8 How. Pr. 321. 2 How. Pr. 146; *Sharkey v. Morgan*, 14 N. Y. S. R. 940.

²²*Schiller v. Maltbie*, 11 N. Y. Civ. Proc. Rep. 304.

²³*Stanton v. King*, 76 N. Y. 585.

²⁴*Middletown v. Rondout & O. R. Co.* 43 How. Pr. 481.

²⁵*Stiles v. Fisher*, 3 How. Pr. 52. ²⁶*Edlefson v. Duryee*, 21 Hun. 607, 59 How. Pr. 326; *Boune v. Anthony*, 13 How. Pr. 301; *Brevoort v. Warner*, 8 How. Pr. 321.

²⁷*Prudden v. Lockport*, 40 How. Pr. 46; *Williams v. Wilkinson*, 5 How. Pr. 357; *Hall v. Huntley*, N. Y. Code Rep. N. S. 21, note.

²⁸*Post v. Jenkins*, 2 How. Pr. 33; *Cortland Mut. L. Ins. Co. v. Lathrop*, 52; *Rider v. Bates*, 66 How. Pr. 129;

²⁹*Welch v. Preston*, 58 How. Pr. 129;

h. Order granting favor.—Whenever a favor is granted upon a motion, the court in granting it has a right to impose any terms or conditions which are in conformity with the usages of the courts in similar cases and which tend to do justice in the action.³⁰ If the moving party is dissatisfied with the terms imposed, he need not accept the favor. Where an order is made granting a privilege to the moving party, and costs are allowed to the opposing party, the moving party must pay costs whether he avails himself of the privilege or not; it would be otherwise if the privilege were granted upon the condition that he pay costs of the motion.³¹

Motion costs are usually imposed upon one of the parties to the action, but sometimes they are imposed upon the attorney as a punishment for his lack of good faith with the court and opposing counsel.³² Costs of motion and disbursements were awarded against an attorney who moved upon insufficient facts, and from improper motives to disbar another attorney.³³

49. Costs upon allowing amendment. *a. In general.*—Costs on permitting an amendment are in the discretion of the court.³⁴

The general rule is that in all cases where a party is allowed to amend, he shall be charged with the costs of all proceedings which will be vacated by the amendment.³⁵

The terms usually imposed upon a plaintiff when he moves before trial for the privilege of serving an amended complaint, where the amendment is substantial, and not formal, is the payment of the defendant's costs to date, and costs of opposing the motion.³⁶

New York, L. E. & W. R. Co. v. Car-
kart, 36 Hun, 288.

³⁰*Stiles v. Fisher*, 3 How. Pr. 52.

³¹*Farmers' Loan & T. Co. v. Bank-*
ers' & M. Tel. Co., 109 N. Y. 342,
16 N. E. 539.

³²*Jordan v. National Shoe & Leath-*
er Bank, 13 Jones & S. 423.

³³*Re Kelly*, 59 N. Y. 595.

³⁴*Eggert v. Bonnett*, 4 Month. L.
Bull. 5; Code Civ. Proc. § 723.

³⁵*Van Valkenburgh v. Van Schaick*,
8 How. Pr. 271.

³⁶*Smith v. Sarin*, 69 Hun. 311, 30
Abb. N. C. 192, 53 N. Y. S. R. 378,
23 N. Y. Supp. 568; *Goring v. Levy*,
22 N. Y. Civ. Proc. Rep. 10, 43 N. Y.
S. R. 767, 17 N. Y. Supp. 771.

Where the amendment is formal, motion costs and such additional costs as will reimburse the defendant are usually imposed.

b. Amendment of complaint during trial.—Where the defendant moved to dismiss the complaint because some formal allegations were omitted, plaintiff was allowed to amend upon paying \$30.³⁷

A plaintiff was allowed to amend his complaint by alleging that he claimed as assignee, upon paying the trial fee and disbursements.³⁸ Where the plaintiff was compelled to pay \$50.50 for withdrawing a juror, he was allowed to amend his complaint by alleging some preliminary steps, which did not change the cause of action, without the payment of any more costs absolutely.³⁹

In a case where a plaintiff was allowed after the proof was all in, to amend his complaint alleging an express contract so as to proceed upon *quantum meruit*, the defendant was not allowed any costs, but was allowed to amend a defective offer of judgment *nunc pro tunc*.⁴⁰

But where the plaintiff cannot recover upon the theory contained in his complaint, and the court, instead of dismissing the complaint at the trial, retains the case in order to allow him to apply at special term for leave to amend his complaint, the special term should impose, as a condition of allowing him to serve an amended complaint, the payment of all costs and disbursements subsequent to the service of the complaint.⁴¹

The terms to be imposed upon granting an order on a motion made at special term must be fixed by that court, they cannot be sent to the referee who is trying the case to determine.⁴²

³⁷*Weill v. Metropolitan R. Co.* 10 Misc. 72, 24 N. Y. Civ. Proc. Rep. 85, 1 N. Y. Anno. Cas. 40, 63 N. Y. S. R. 170, 30 N. Y. Supp. 833.

³⁸*Minton v. Home Benefit Soc.* 16 N. Y. S. R. 1001, 1 N. Y. Supp. 838.

³⁹*Union Bank v. Mott*, 19 How. Pr. 267, 11 Abb. Pr. 42.

⁴⁰*Flynn v. Westmayer*, 14 N. Y. Civ. Proc. Rep. 130, 4 N. Y. Supp. 188; *Hare v. White*, 3 How. Pr. 296, 1 N. Y. Code Rep. 70.

⁴¹*Lindblad v. Lynde*, 81 App. Div. 603, 81 N. Y. Supp. 351.

⁴²*Stanton v. Swann*, 23 N. Y. Week. Dig. 382.

c. Amendment of complaint after judgment.—The terms imposed upon the plaintiff who desires to amend his complaint so as to demand damages equal to the verdict should be the costs of the trial, the relinquishing of the verdict, and consenting to a new trial.⁴³ The same rule obtains under the Code of Civil Procedure,⁴⁴ notwithstanding § 1207.

d. Amendment of complaint after appeal.—Where after an adjudication in the appellate court that he cannot recover upon the cause of action contained in the complaint, the plaintiff moves for leave to serve an amended complaint which will involve other issues than those set forth in the original complaint, such permission should be granted only on condition of his paying the defendant's costs up to date, including costs in the appellate court, awarded to the defendant to abide the event.⁴⁵ Sometimes costs of opposing the motion in addition have been granted.⁴⁶ But the plaintiff will not be compelled to pay the defendant the amount of an extra allowance granted to the plaintiff.⁴⁷ Double costs will not be charged where the defendant is a public officer, unless they are mentioned in the order.⁴⁸ Nor will the fact that the plaintiff is suing *in forma pauperis* relieve

⁴³*Coulter v. American Merchants' Union Exp. Co.* 5 Lans. 67; *Corning v. Corning*, 6 N. Y. 97; *Dox v. Dey*, 3 Wend. 356; *Curtiss v. Laurence*, 17 Johns. 111.

⁴⁴*Pharis v. Gere*, 31 Hun, 443.

⁴⁵*Bates v. Salt Springs Nat. Bank*, 43 App. Div. 321, 60 N. Y. Supp. 313; *McEntyre v. Tucker*, 40 App. Div. 444, 29 N. Y. Civ. Proc. Rep. 185, 58 N. Y. Supp. 146; *For v. Davidson*, 40 App. Div. 620, 58 N. Y. Supp. 147; *Cramer v. Lovejoy*, 41 Hun, 581; *Brady v. Cassidy*, 37 N. Y. S. R. 501, 13 N. Y. Supp. 824; *Frishie v. Arcrell*, 87 Hun, 217, 33 N. Y. Supp. 1021; *Elghmie v. Taylor*, 23 N. Y. Week. Dig. 429; *McGrane v. New York*, 19 How. Pr. 144; *Bowen v. Sweeney*, 66 Hun, 42, 49 N.

Y. S. R. 603, 20 N. Y. Supp. 733; *Salters v. Genin*, 8 Abb. Pr. 253, 3 Bosw. 639; *Walton v. Mather*, 10 Misc. 216, 31 N. Y. Supp. 111; *Ireland v. Metropolitan Elcr. R. Co.* 8 N. Y. S. R. 127; *Satterlee v. Clermont*, N. Y. Daily Reg. May 26, 1883; *Nanetty v. Naylor*, 2 Month. L. Bull. 65, 66; *Nicoll v. Lloyd*, 33 Misc. 775, 67 N. Y. Supp. 947; *Thillemann v. New York*, 71 App. Div. 595, 76 N. Y. Supp. 132.

⁴⁶*Troy & B. R. Co. v. Tibbits*, 11 How. Pr. 168.

⁴⁷*Troy & B. R. Co. v. Tibbits*, 11 How. Pr. 168.

⁴⁸*Saratoga & W. R. Co. v. McCoy*, 7 How. Pr. 190.

him from the general rule. In such a case, the order may provide that the defendant's costs shall be deducted from any recovery obtained by the plaintiff.⁴⁹

Where a plaintiff was allowed to amend his complaint to obviate some formal defects pointed out by the court of appeals, and the defendant was allowed to set up a new equitable defense in his answer, the terms imposed upon the plaintiff were the payment of the costs in the court of appeals, the other costs were ordered to abide the event.⁵⁰

Where a father sued the defendant for harboring his son and depriving him of his services, and the verdict was set aside, he was allowed to amend his complaint so as to sue for wages earned, upon paying trial fee \$30 and \$10 costs of motion.⁵¹

e. Amendment of answer.—A defendant will be allowed to amend his answer after a reversal by the appellate court, and the direction of a new trial, so as to obviate the defect pointed out by the appellate court. The terms usually imposed are the payment of all costs for proceedings which will be rendered nugatory by the amendment, which is all the costs after notice of trial. This is so although no costs were awarded upon the trial or upon appeal. The trial has been had and the appeal taken, and the plaintiff should not pay for the mistake of the defendant.⁵²

In a proper case the plaintiff should also have the privilege of discontinuing without costs, after the amended answer is served and costs therefor are paid. Sometimes all the costs of the action are required to be paid for the privilege of amending.⁵³

⁴⁹*Coyle v. Third Ave. R. Co.* 19 Misc. 345, 43 N. Y. Supp. 499.

⁵⁰*Tooker v. Arnoux*, 10 N. Y. Week. Dig. 132, 1 Month. L. Bull. 54.

⁵¹*Hopff v. United States Baking Co.* 48 N. Y. S. R. 729, 21 N. Y. Supp. 589.

⁵²*Rodgers v. Clement*, 58 App. Div. 54, 68 N. Y. Supp. 594; *Guliano v. Whitenack*, 3 Misc. 54, 51 N. Y. S. R. 768, 22 N. Y. Supp. 560.

⁵³*Tradesmen's Nat. Bank v. Curtis*, 63 App. Div. 14, 71 N. Y. Supp. 414.

The court sometimes only imposes a portion of the costs of the appeal and the costs of the trial court and costs of motion.⁵⁴

The city court of New York and the New York superior court have held that, where the reversal was with costs to abide the event, the defendant should be allowed to serve an amended answer upon the payment of all costs to date,⁵⁵ but where the judgment was reversed with costs to the appellant to abide the event, the defendant should be required to pay as a condition of serving an amended answer all the costs awarded to the appellant upon the appeal, and the costs of the motion.⁵⁶

Payment of an additional allowance made to the plaintiff in the trial court should not be imposed as a condition of amendment. The judgment upon which the additional allowance was made is gone, and the extra allowance falls with it. If an additional allowance was proper on the first trial, it would probably be proper on the second trial. In that case there would be two additional allowances in one action. The additional allowance is supposed to be granted only on the final judgment.⁵⁷

Where the defendant was the appellant and succeeded upon the appeal, and, upon the new trial, facts developed which made it seem best to the defendant to serve an amended answer, the court allowed him to amend upon the payment of a lump sum to be applied upon the taxable costs and the disbursements incurred by the plaintiff.⁵⁸

A defendant was allowed to serve an amended answer upon the payment of motion costs only, because the amendment would not change the issues, and would not benefit the defendant or compel the plaintiff to serve an amended complaint.⁵⁹

⁵⁴*Wardlaw v. New York*, 30 Abb. N. C. 129, 23 N. Y. Supp. 669.

⁵⁵*Alexander Lumber Co. v. Abrahams*, 20 Misc. 674, 46 N. Y. Supp. 538; *Walton v. Mather*, 10 Misc. 216, 31 N. Y. Supp. 111.

⁵⁶*Alexander Lumber Co. v. Abrahams*, 20 Misc. 674, 46 N. Y. Supp. 538; *Ireland v. Metropolitan Elev. R. Co.* 8 N. Y. S. R. 127.

⁵⁷*Wardlaw v. New York*, 30 Abb. N. C. 129, 23 N. Y. Supp. 669.

⁵⁸*Van Allan v. Gordon*, 92 Hun. 500, 72 N. Y. S. R. 91, 36 N. Y. Supp. 987.

⁵⁹*Brown v. May*, 17 Abb. N. C. 208, 23 N. Y. Week. Dig. 480.

The attorney for the defendant, upon preparing his case for trial, discovered that the information given him from which he drew the answer was incorrect. The defendant was allowed to amend upon paying costs after notice and before trial and motion costs.⁶⁰

Where a case had been on the day calendar for some time and the defendant has delayed the trial for various reasons, the defendant was allowed to serve an amended answer changing the defense upon paying all costs.⁶¹

f. Serving supplemental answer.—In an action for assault and battery, the defendant was allowed to set up the recovery and satisfaction of judgment against another for the same cause of action, upon the payment of \$10 costs of motion and any taxable disbursement incurred in the untried action, and not included in the other, under § 3231 of the Code of Civil Procedure.⁶²

In an equity action, relief is given according to the facts as they exist at the time of the trial. The defendant in such an action should be allowed to serve a supplemental answer setting up facts that have arisen since the serving of his answer, but when he is guilty of laches in not moving until the cause is moved for trial, he should pay the costs of the trial. The further conditions were imposed that he should waive all costs awarded on the former proceedings in the event that he should finally succeed, and that the plaintiff might discontinue without costs if he so elected.⁶³ A defendant may be allowed to set up in a supplemental answer facts that existed at the time that the original answer was served, but he should be required to pay costs to date and to stipulate that the plaintiff may discontinue without costs.⁶⁴

⁶⁰*Peterson v. Felt*, 61 App. Div. 176, 70 N. Y. Supp. 440.

⁶¹*Tribune Asso. v. Smith*, 8 Jones & S. 99.

⁶²*Roberts v. Warren*, 3 How. Pr. N. S. 524.

⁶³*Haffey v. Lynch*, 46 App. Div. 160, 61 N. Y. Supp. 736.

⁶⁴*Preservalline Mfg. Co. v. Selling*, 75 App. Div. 474, 78 N. Y. Supp. 299.

g. Construction of order.—A plaintiff moved that the defendant make his answer more definite and certain. The motion was granted, and the defendant was ordered to pay \$10 costs of motion. It was held that he could serve his answer without paying the costs imposed by the order, as that was not a condition precedent. To have that effect the order must provide that it be “on payment, etc.,” or some equivalent expression.⁶⁵

Where an order allows the defendant to serve an amended answer upon paying “costs of the action to the present time,” this means such costs as would go to the plaintiff in case there had been a termination favorable to him at the time of the order giving the defendant leave to amend.⁶⁶

h. Relaxing of costs paid as condition of amending.—There is a contradiction of decisions on the question of the right of either party to again tax the costs that have once been paid, for the granting of some privilege, such as serving an amended pleading. The majority of cases, however, hold that the costs once paid as a condition of amending the pleadings cannot be again taxed by either party, that the order permitting the amendment is an adjudication that the items covered by it belong to the party named in the order.⁶⁷

There are cases which hold that where a party pays costs for the privilege of amending, and he is defeated upon the issue

⁶⁵*Sturtevant v. Fairman*, 4 Sandf. 674; *Re Amsterdam Water Comrs.* 36 Hun, 534. *Schmidt v. Muckie*, 9 N. Y. Week. Dig. 288; *Skinner v. White*, 69 Hun, 127, 52 N. Y. S. R. 737, 23 N. Y. Supp. 384.

⁶⁶*Dawson v. Burnham*, 2 Month L. Bull. 32; *Haremeyer v. Haremeyer*, 12 Jones & S. 172. *Seneca Nation of Indians v. Hawley*, 32 Hun, 288; *Seymour v. Ashenden*, 13 N. Y. Civ. Proc. Rep. 255.

⁶⁷*Woolsey v. Ellenville*, 84 Hun, 236, 65 N. Y. S. R. 746, 32 N. Y. Supp. 546; *Mare v. Gross*, 2 Misc. Div. 276, 7 N. Y. Anno. Cas. 320, 63 N. Y. Civ. Proc. Rep. 97, 51 N. Y. S. R. 92, 22 N. Y. Supp. 387; *Provost v. Farrell*, 13 Hun, 255; *Cahill v. New York*, 50 App. Div. 276, 7 N. Y. Anno. Cas. 320, 63 N. Y. Civ. Proc. Rep. 97, 51 N. Y. S. R. 92, 22 N. Y. Supp. 387; *Provost v. Farrell*, 13 Hun, 255; *Cahill v. New York*, 50 App. Div. 276, 7 N. Y. Anno. Cas. 320, 63 N. Y. Civ. Proc. Rep. 97, 51 N. Y. S. R. 92, 22 N. Y. Supp. 387.

raised by the amended pleading, his adversary can again tax the costs that were paid for the privilege of amending.⁶⁸

There are cases which hold that where a party pays costs for the privilege of amending and wins upon the issue raised by the amended pleading, he can tax the costs which he paid for the privilege of amending.⁶⁹ There doubtless will never be a uniformity of decisions on this point because every court has a right to interpret its own order,⁷⁰ and each court has a right to say what it means, when it uses certain words.

50. Costs on change of parties.— A motion to revive and continue an action in the name of the administrator of the deceased plaintiff, should, where the action is meritorious, be granted, and the plaintiff should not be required to give security for costs.⁷¹ Nor should costs of the motion be imposed upon the defendant.⁷²

Terms should not be imposed upon the plaintiff in bringing in a new defendant by amendment, where the necessity of so doing was shown by an amended answer the right to serve which was granted as a favor.⁷³

Where an order substitutes another defendant in place of the present defendant, with costs to the present time, the question whether such costs should have been allowed can be raised only by appeal from that order. It cannot be raised upon an appeal from the taxation of such costs.⁷⁴

51. Motions on the pleadings. *a. Striking out scandalous pleadings.*—No costs will be allowed where the court of its own motion strikes out as scandalous allegations contained in the

⁶⁸*Bowen v. Succeney*, 66 Hun, 42. ⁷¹*Collins v. Jewell*, 3 Misc. 341, 23 49 N. Y. S. R. 603, 20 N. Y. Supp. N. Y. Civ. Proc. Rep. 153, 51 N. Y. 733; *Cohn v. Husson*, 13 Daly, 334; S. R. 927, 22 N. Y. Supp. 716.

Donovan v. Board of Education, 1 ⁷²*Meckin v. Brooklyn Heights R. Co.* 51 App. Div. 1, 64 N. Y. Supp. N. Y. Civ. Proc. Rep. 311. 291.

⁶⁹*Dovale v. Ackerman*, 24 Abb. N. ⁷³*People v. Brooklyn*, 6 App. Div. C. 214, 11 N. Y. Supp. 5; *Havemeyer v. Havemeyer*, 16 Jones & S. 104. 202, 39 N. Y. Supp. 809.

⁷⁰*Scymour v. Ashenden*, 13 N. Y. ⁷⁴*Wehle v. Bowery Sav. Bank*, 8 Civ. Proc. Rep. 255; *Havemeyer v. Jones & S. 161.* *Havemeyer*, 16 Jones & S. 104.

pleadings. If a motion should be made for that purpose, costs would be granted against the attorney personally.⁷⁵

b. Striking out pleadings as punishment.—The court, upon a motion to strike out a party's pleadings on account of his refusal to answer questions, may grant less than is asked in the moving papers, and still grant costs of the motion to the moving party.⁷⁶

The court may make the same disposition of a motion to strike out matter as redundant.⁷⁷

There is no appeal from such an order granting costs, as the order does not involve the merits of the action, nor affect a substantial right.⁷⁸ Where the plaintiff in an action against a corporation receives a collusive answer from a part of the trustees with knowledge that they have been removed, such answer will be stricken out upon a motion of the remaining trustees, with costs against the plaintiff.⁷⁹ Upon the granting of an order setting aside the service of a summons and complaint for want of jurisdiction, the defendant is entitled to motion costs only, and not costs of the action.⁸⁰

c. Motion for judgment on frivolous pleading.—Costs as upon a motion may be awarded upon an application for judgment, on account of the frivolousness of a demurrer, answer, or reply.⁸¹ Where the defendant admitted that the plaintiff was entitled to the relief demanded and alleged that the reason why he positively refused to execute the papers when presented to him was that he did not understand their force, he is properly chargeable with costs on a motion to strike out his answer as frivolous.⁸²

⁷⁵*People ex rel. Allen v. Murray*, 23 N. Y. Civ. Proc. Rep. 53, 22 N. Y. Supp. 1051. ⁸⁰*Bernhard v. Rice*, 61 Hun, 184, 21 N. Y. Civ. Proc. Rep. 331, 40 N. Y. S. R. 570, 15 N. Y. Supp. 936;

⁷⁶*Dambmann v. Butterfield*, 2 Hun, 284, 4 Thomp. & C. 542. *Ex parte Benson*, 6 Cow. 592; *People ex rel. Mallard v. Madison County*

⁷⁷*Dennison v. Dennison*, 9 How. Pr. 246. *Judges*, 7 Cow. 423. ⁸¹Code Civ. Proc. § 537; *Wesley v.*

⁷⁸*Dennison v. Dennison*, 9 How. Pr. 246. *Bennett*, 6 Abb. Pr. 12. ⁸²*Dorman v. Smith*, 29 N. Y. S. R.

⁷⁹*Holy Trinity Church v. St. Stephen's Church*, 38 N. Y. S. R. 129, 15 N. Y. Supp. 117. 636, 9 N. Y. Supp. 91.

The plaintiff is entitled upon a judgment granted upon such an application to costs as upon default, and costs allowed upon the application.

52. Dismissal for neglect to prosecute.—Where a complaint is dismissed under § 822 of the Code of Civil Procedure for failure to prosecute, judgment will be entered for the defendant with costs up to that time, and costs of the motion if granted.⁸³ The defendant is not entitled to costs “after notice of trial” unless he filed a note of issue; serving a notice of trial is not sufficient.⁸⁴ The complaint of an infant who prosecutes an action without having a guardian appointed should be dismissed without costs, and the plaintiff allowed to file the necessary papers *nunc pro tunc*.⁸⁵

Upon a motion by a defendant to dismiss the plaintiff's complaint because he had not served other defendants, the plaintiff will not be compelled to pay disbursements which he did not cause the defendant, as a condition of having his action retained. He can be compelled to pay motion costs.⁸⁶

53. Motion for bill of particulars.—Upon a motion for a bill of particulars, the moving party is usually given costs in case he wholly succeeds, but where he is only partly successful, the costs should be made to abide the result of the action.⁸⁷

54. Motion for bill of discovery.—Usually costs upon a motion for discovery and inspection should, if the order is granted, be allowed to the moving party to abide the event.⁸⁸ But where the opposing party unreasonably refuses to exhibit a document which his adversary is entitled to see, costs will be imposed absolutely.⁸⁹

⁸³*Bowles v. Van Horne*, 11 Abb. Pr. 84, 19 How. Pr. 346.

⁸⁷*Williams v. Folsom*, 37 N. Y. S. R. 635, 13 N. Y. Supp. 712.

⁸⁴*Gilroy v. Stampfer*, 30 Misc. 830, 61 N. Y. Supp. 924. *Contra, Roberts v. Aden*, 2 N. Y. City Ct. Rep. 302.

⁸⁸*McGrath v. Alger*, 40 App. Div. 610, 57 N. Y. Supp. 519.

⁸⁵*Imhoff v. Wurtz*, 9 N. Y. Civ. Proc. Rep. 48.

⁸⁹*Seligman v. Real Estate Trust Co.* 20 Abb. N. C. 210.

⁸⁶*Geoghegan v. Luchow*, 75 App. Div. 581, 78 N. Y. Supp. 278.

55. Change of venue. *a. Convenience of witnesses.*—Costs of motion to change the place of trial for the convenience of witnesses is usually made to abide the event, but where the motion is denied owing to defects in the moving papers, costs are usually given absolutely against the moving party, especially where leave is granted to renew the motion on other papers.⁹⁰

b. Venue laid in wrong county.—It is the duty of the plaintiff to change the place of trial to the proper county by amendment, or order where the venue has been laid in the wrong county, and the defendant has demanded that the place of trial be changed to the proper county. If the plaintiff does not make the change after such a demand, he should be charged with costs of the motion to change the place of trial to the proper county.⁹¹

The plaintiff will be allowed costs of appearing upon a motion to change the place of trial, where the defendant demanded costs in his notice of motion, and the plaintiff does not oppose the change, but appears so that costs will not be charged against him.⁹²

56. Opening defaults. *a. In general.*—Costs upon a motion to open a default should not be granted with costs to abide the event, as it holds out a premium to the defendant in case he wins on the trial.⁹³

Costs of only one motion and the disbursements, including referee's fees, can be imposed upon granting a motion by the defendant to open a default, when the question of the time of serving the complaint is sent to a referee to ascertain facts.⁹⁴

It is proper to impose as a condition for opening a judgment and allowing a defendant to come in and defend, the costs of the

⁹⁰*McPhail v. Ridout*, 83 Hun, 446.
64 N. Y. S. R. 661, 31 N. Y. Supp.
934.

⁹¹*Hubbard v. National Protection*
Ins. Co. 11 How. Pr. 149.

⁹²*Phelps v. Wasson*, 2 How. Pr.
126.

⁹³*Richardson v. Sun Printing &*
Pub. Asso. 20 App. Div. 329, 46 N.
Y. Supp. 814.

⁹⁴*Martin v. Hodges*, 45 Hun, 38.

trial, and "for all proceedings after notice and before trial," as the latter costs are supposed to be compensation for serving subpoenas as well as for counsel for preparing brief.⁹⁵

The payment of costs which cannot be charged against a defendant or his property, and which are a nullity, should not be imposed as a condition for allowing a defendant to come in and defend.⁹⁶

Where the plaintiff obtained an order permitting him to serve a reply, but instead of serving it he noticed the case for trial, when the defendant moved for judgment for failure to reply, the plaintiff was allowed to serve his reply upon paying the \$10 costs of defendant's motion, first ordered,—\$10 term fees, and \$10 costs of second motion.⁹⁷

The court will allow a defendant in default to answer and set up a settlement of the claim in suit, only upon payment of the costs and with the privilege to the plaintiff, after receiving such payment, to discontinue without costs.⁹⁸

Sometimes more onerous terms are imposed. A judgment by default taken by the defendant upon a counterclaim, for failure to reply, was opened upon the plaintiff paying motion costs, trial fee, giving bond in the sum of \$250 to pay costs, if defeated, and the judgment on the counterclaim was allowed to stand as security.⁹⁹ More onerous terms will be imposed upon opening a default where the court seeks to discourage a custom that interferes with the business of the court, or there is a serious question as to the good faith of the attorney.

b. On the trial.—A motion to open a default taken by the plaintiff was granted upon the payment by the defendant of all

⁹⁵*Van Loan v. Squires*, 51 Hun. 360, 21 N. Y. S. R. 526, 4 N. Y. Supp. 371. ⁹⁸*Gallison v. Rawak*, 24 N. Y. S. R. 318, 3 N. Y. Supp. 802.

⁹⁹*Pomares v. Duncan*, 25 Abb. N. C. 58, 11 N. Y. Supp. 380. Pr. 287.

⁹⁷*Montecarbole v. Mundel*, 16 How. Pr. 141.

the costs taxed in the judgment, where both parties answered "ready" on the call of the calendar, but the defendant did not attend ready for trial, because it had been informed that a prior case would be tried.¹⁰⁰

The court imposed as condition of opening a default, the payment of motion costs, trial fee, term fee, and disbursements, and a stipulation that no application for adjournment should be made to postpone the case when reached, in a case where the attorney had a case postponed on account of his illness, but he tried a case in another court that day, and on the next day was engaged in the trial of still another case, when his default was taken.¹⁰¹

A defendant will not be allowed to open a default until he has paid the costs incurred by his opponent up to that time in opposing his unsuccessful attempt to set aside the judgment.¹⁰²

Where an inquest is opened upon terms and an amended pleading is allowed to be served, the moving party has a right to pay the costs imposed within the time limited by the statute (Code Civ. Proc. § 779) unless the order provides a different time.¹⁰³

It lies in the discretion of the trial judge to allow a default to be opened without the payment of costs, where the moving party has been defeated upon a previous motion to open the default but was allowed to renew the motion upon the payment of costs.¹⁰⁴

The sum of \$192.98 was held to be an excessive amount to be imposed upon the opening of a default, and was reduced to \$85.85.¹⁰⁵

In another case where a default had been taken after the case

¹⁰⁰*Goodness v. Metropolitan Street* 373, 71 N. Y. S. R. 682, 36 N. Y. R. Co. 49 App. Div. 76, 63 N. Y. Supp. 752.
Supp. 476.

¹⁰⁴*Stransky v. Weichman*, 24 Misc.

¹⁰¹*Muller v. Post*, 33 N. Y. S. R. 767, 53 N. Y. Supp. 549.

992, 11 N. Y. Supp. 615.

¹⁰⁵*Jones v. Tienken*, 10 N. Y. Week

¹⁰²*Szerlip v. Baier*, 22 Misc. 351. 49 Dig. 219.

N. Y. Supp. 300.

¹⁰³*Van Ingen v. Hilton*, 91 Hun,

had been placed on the day calendar, the default was opened upon the payment of term fees and costs of motion.¹⁰⁶

Where a defendant was told by a codefendant that a part of the note sued on had been paid and that the balance would be paid before judgment could be taken, the default was opened, but the order provided that if the defendant should recover it should be without costs after notice of trial, and further, that the plaintiff might discontinue without paying costs.¹⁰⁷

Where upon a motion by the plaintiff to substitute a new defendant in place of the present defendant, a reference had been ordered to ascertain the facts, and the plaintiff had defaulted upon the reference, whereupon the defendant had paid the referee's fees and taken up his report, the plaintiff was allowed to open the default upon the payment to the defendant of the amount he had paid the referee (\$10), costs of motion, and \$25 in addition thereto.¹⁰⁸

No costs will be allowed or imposed upon the opening of a default where neither party is at fault, as in a case where the answer was mailed at 11 P. M. on the last day to answer, and the plaintiff entered up judgment at noon the next day, no answer having been then received,¹⁰⁹ or where the defendant took default, not knowing that his clerk had stipulated that neither party should take a default.¹¹⁰ Where the plaintiff took judgment by default, which was paid, and he then discovered that he had not demanded the amount that he should, he was allowed to vacate the judgment by returning the amount received and paying to the defendant the costs of trial and costs of appeal from the order which denied him relief.¹¹¹

¹⁰⁶*Anderson v. Johnson*, 1 Sandf. 736, 1 N. Y. Code Rep. 94; *Richmond v. Russell*, 1 N. Y. Code Rep. 85.

¹⁰⁷*Smith v. Weston*, 81 Hun. 87, 24 N. Y. Civ. Proc. Rep. 141, 62 N. Y. S. R. 623, 30 N. Y. Supp. 649.

¹⁰⁸*Weinberger v. Metropolitan Traction Co.* 63 App. Div. 240, 71 N. Y. Supp. 289.

¹⁰⁹*Gillespie v. Satterlee*, 18 Misc. 606, 42 N. Y. Supp. 463.

¹¹⁰*Brady v. Martin*, 19 N. Y. Civ. Proc. Rep. 134, 33 N. Y. S. R. 425, 11 N. Y. Supp. 424.

¹¹¹*McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656.

c. Waiver of costs granted.—Where a party is granted costs upon a motion by the opposite party to open a default, and he refuses them when they are tendered to him, he waives them; he cannot offset costs nor insist upon a stay of proceedings until they are paid. He can collect them only by execution.¹¹²

d. Costs to abide event.—Where costs are given upon the opening of a default to one party to abide the event, neither party is entitled to them unless, upon the final judgment, he becomes entitled to the general costs of the action.¹¹³

e. Costs to moving party.—Costs of motion will be granted to the party moving to open a default, where the judgment has been entered irregularly,¹¹⁴ or where the party has assumed to decide that his opponent has not a right to serve a certain pleading, and treats it as a nullity, when that question should be decided by the court.¹¹⁵

f. Default on appeal.—A plaintiff was allowed to open a default upon an appeal and serve a case upon the condition that he give security for costs on appeal.¹¹⁶

¹¹²*Kiefer v. Grand Trunk R. Co.*, 12 Abb. Pr. 37 N. Y. S. R. 306, 13 N. Y. Supp. 353, 21 How. Pr. 333.
860.

¹¹³*New v. Anthony*, 4 Hun, 52, 6 26 N. Y. Week. Dig. 108, 6 N. Y. S. R. 868.
¹¹⁴*McGillivray v. Standard Oil Co.*

¹¹⁵*Gilmartin v. Smith*, 4 Sandf. 584.

CHAPTER V.

COSTS UPON A DISCONTINUANCE.

- 57. In general.
- 58. Excuse for discontinuance.
- 59. How order obtained.
- 60. Two bills of costs.
- 61. Rights of defendant.
- 62. When a trial fee is allowed.
- 63. Discontinuance in equity actions.
- 64. Discontinuance when a receiver has been appointed or an injunction granted.
- 65. Discontinuance after appeal.
- 66. Additional allowance upon a discontinuance.
- 67. Discontinuance in special proceedings.
- 68. Refusal of plaintiff to accept terms of discontinuance.
- 69. Protection of attorney upon a discontinuance.
- 70. Order to be entered upon discontinuance.

57. In general.—Ordinarily, a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court. He has the same right to discontinue that he has of submitting to a nonsuit at the trial.¹ Where substantial rights of other parties have accrued or injustice will be done, the court has a discretion to refuse to allow a discontinuance, but where there are no such facts, and nothing appears to show a violation of a right or interest of the adverse party, the plaintiff may discontinue, and a refusal of leave to discontinue becomes merely arbitrary and without any basis upon which discretion can exist.² The same rule applies to actions in equity and to actions at law.³ The order of discontinuance may be obtained *ex parte*, but the court will

¹*Re Butler*, 101 N. Y. 307, 4 N. E. 375; *Re Anthony Street*, 20 Wend. 518.

618. 32 Am. Dec. 608.

²*Re Butler*, 101 N. Y. 307, 4 N. E. 375; *Cummings v. Bennett*, 8 Paige, 81. 518; *Carleton v. Darcy*, 75 N. Y.

reopen such an order and make such an order as the facts require upon the application of the defendant.⁴

An order of discontinuance is properly refused where a counterclaim, set up by the defendant, will be barred by the statute of limitations if the action is discontinued,⁵ or where the plaintiff has agreed to bring an action for the benefit of others similarly situated and the discontinuance would leave the other persons without redress, because their claims would be barred by the statute of limitations,⁶ or where the defendant has examined witnesses and their testimony would have to be taken again in any new action. In the last case the plaintiff would be allowed to discontinue upon stipulating that such evidence might be used in any action subsequently brought upon the same cause of action.⁷ A plaintiff is also properly refused permission to discontinue an action in ejectment where he has recovered judgment in the action and been put in possession, but the defendant has paid the costs and taken a new trial,⁸ or where the plaintiff seeks to set up the statute of limitations to the counterclaim set up in the answer, and has been refused that privilege at special term,⁹ but the mere fact that the defendant has set up a counterclaim is not sufficient to deprive the plaintiff of the right to discontinue. The defendant must also have some rights in the present action that he would not have in a new action, in order to warrant the court in refusing a discontinuance.¹⁰ In actions in which the public have a peculiar interest, such as actions for divorce,¹¹ or in actions relating to the opening or closing of highways,¹² public policy may demand that the plaintiff try

⁴*Carleton v. Darcy*, 75 N. Y. 375.

⁵*Yellow Pine Co. v. Lchigh Valley*

⁶*Van Alen v. Schermerhorn*, 14 How. Pr. 287.

Oreosoting Co. 32 App. Div. 51, 52 N. Y. Supp. 281.

⁷*Hirshfeld v. Bopp*, 5 App. Div. 202, 39 N. Y. Supp. 24.

⁸*Scaboard & R. R. Co. v. Ward*, 18 Barb. 595, 1 Abb. Pr. 46.

⁹*Cockle v. Underwood*, 3 Duer. 676. *Contra*, *Cooke v. Beach*, 25 How. Pr. 356.

¹⁰*Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293.

¹¹*Iselin v. Smith*, 62 Hun, 221, 16

¹²*Carleton v. Darcy*, 75 N. Y. 375. N. Y. Supp. 683.

out his case, although the defendant would not be injured by a discontinuance.

The plaintiff will be allowed to discontinue without the payment of any cost to the defendant if he enters his order before the defendant appears in the action. It makes no difference that he has retained an attorney, if he has not appeared in the action.¹³ Obtaining the order and serving notice thereof are not sufficient, the order must be entered before appearance.¹⁴

A defendant upon a discontinuance obtained at his request is sometimes ordered to pay the costs of a codefendant whom he has had unnecessarily made a party to the action.¹⁵

In an action at law the plaintiff cannot, without a proper excuse, be allowed to discontinue upon payment of motion costs merely. He must also pay all the costs of the action that have accrued up to the time when he wishes to discontinue. Costs in such an action are not discretionary, but are regulated by statute.¹⁶

58. Excuse for discontinuance.—Where the plaintiff shows a sufficient excuse in the instituting of the action, or the occurrence of circumstances, since the commencement of the action, which equitably entitle him to discontinue, he may be allowed to discontinue without costs, or only costs of the motion, in the discretion of the court,¹⁷ and such discretion cannot be overruled upon appeal, unless the order is arbitrary and there are no facts to justify it.¹⁸ It has been held a sufficient excuse to allow the

¹³*Smith v. White*, 7 Hill, 520; ¹⁶*Claffin v. Robertson*, 1 Silv. Sup. Ct. 176, 23 N. Y. S. R. 305, 6 N. Y. 10 How. Pr. 85; *Kenna v. Atlas S. S. Co.* 19 Abb. N. C. 265; *Hallett v. Hallett*, 10 Misc. 304, 24 N. Y. Civ. Proc. Rep. 102, 63 N. Y. S. R. 175, 30 N. Y. Supp. 946.

¹⁴*Schenck v. Fancher*, 14 How. Pr. 95; *Weigan v. Held*, 3 Abb. Pr. 462; *Bedell v. Powell*, 13 Barb. 183.

¹⁵*Richardson v. Thedford*, 5 App. Div. 404, 39 N. Y. Supp. 307.

¹⁷*Staiger v. Schultz*, 3 Keyes. 614.

¹⁸*Petty v. Metropolitan Street R. Co.* 33 Misc. 738, 68 N. Y. Supp. 730; *Schildwachter v. New York*, 12 Misc. 52, 24 N. Y. Civ. Proc. Rep. 390, 66 N. Y. S. R. 672, 33 N. Y. Supp. 41.

discontinuance of an action without the payment of full costs, that the defendant had obtained a release of the claim,¹⁹ or had obtained a discharge under the insolvent law,²⁰ or that, pending the action, had obtained a discharge in bankruptcy.²¹

But where the plaintiff knows of the defendant's discharge and goes on with the action, he will be compelled to pay the defendant's costs after the discharge.²² But if it appears that he never had a case against the bankrupt, he will be compelled to pay the costs upon obtaining an order of discontinuance.²³ It is a sufficient excuse to allow the plaintiff to discontinue without the payment of costs, in an action by an infant by her guardian *ad litem*, that he, being required to give security for costs, is unable to do so,²⁴ or when an action is brought to recover penalties given by statute, and the statute is repealed without any saving clause;²⁵ or the infancy of the defendant is alleged in the answer;²⁶ or is proved on the trial;²⁷ or in an action brought to abate a nuisance, prosecuted in good faith but upon doubtful grounds, where since the commencement of the action the defendant has voluntarily abated the nuisance in part;²⁸ or where the cause of action is against a person of the same name as the defendant, and the motion to discontinue is made as soon as the mistake is discovered;²⁹ or where a person is alleged to be a

¹⁹*De Barante v. Deyermant*, 41 N. Y. 355, 40 How. Pr. 180.

²⁰*Staiger v. Schultz*, 3 Keyes, 614; *Hart v. Storey*, 1 Johns. 143; *Merchants' Bank v. Moore*, 2 Johns. 294; *Honeywell v. Burns*, 8 Cow. 121.

²¹*Hart v. Storey*, 1 Johns. 143; *Merchants' Bank v. Moore*, 2 Johns. 294; *Case v. Belknap*, 5 Cow. 422; *Lafron v. Worum*, 5 Hill, 373; *Park v. Moore*, 4 Hill, 592.

²²*Ludlow v. Hackett*, 18 Johns. 252; *Merritt v. Arden*, 1 Wend. 91; *St. John v. Hart*, 16 How. Pr. 192; *Smith v. Skinner*, 1 How. Pr. 122.

²³*Ludington v. Bell*, 13 Jones & S. 513.

²⁴*Hoffman v. Ridley*, 4 N. Y. Civ. Proc. Rep. 41.

²⁵*Cole v. Rose*, 65 How. Pr. 520; *Gale v. Wells*, 7 How. Pr. 191; *Porter v. Jones*, 7 How. Pr. 192.

²⁶*Wellington v. Classon*, 9 Abb. Pr. 175, 18 How. Pr. 10; *Ex parte Nelson*, 1 Cow. 417; *Van Buren v. Fort*, 4 Wend. 209; *Cuyler v. Coats*, 10 How. Pr. 141.

²⁷*Butler v. Morris*, 1 Bosw. 329.

²⁸*Lochlin v. Casler*, 52 How. Pr. 228.

²⁹*National Wall Paper Co. v. Szerlip*, 9 App. Div. 206, 41 Supp. 376.

member of a firm against which an action is brought, but the mistake is discovered before the papers are served upon him, but he appears in the action and denies that he is a member of the firm;³⁰ or where an executor brings a wrong action by mistake;³¹ or where the defendant is sued as a trustee and he had resigned the day before the service of the summons but concealed that fact.³²

A plaintiff has been allowed to discontinue an action without costs when he had commenced the action under the mistaken impression that under a stipulation between the parties he could introduce upon the trial as evidence certain depositions taken in another action.³³

A merely formal party will not be allowed costs upon the discontinuance of an action by the real parties in interest.³⁴ But the mere poverty of the plaintiff, or the removal of a cause to a court where costs are greater, is not a sufficient excuse, because the plaintiff knew the fact of his poverty and the liability of the removal of the cause when the action was commenced, and can continue the action as a poor person if necessary.³⁵ The plaintiff who has been allowed to sue as a poor person will be compelled to pay costs upon obtaining an order of discontinuance.³⁶ It is not a sufficient excuse that the court on appeal has declared the law so that a recovery by the plaintiff is hopeless when he knew all the facts when he brought the action.³⁷ Nor is it a sufficient excuse that the plaintiff has sold the property which was the subject-matter of the action, since the service

³⁰*Waterbury Leather Mfg. Co. v. Krause*, 1 Hilt. 560, 9 Abb. Pr. 175 note.

³¹*Phoenix v. Hill*, 3 Johns. 249; *Arnoux v. Steinbrenner*, 1 Paige, 82; *Purdy v. Purdy*, 5 Cow. 14; *Morse v. McCoy*, 4 Cow. 551.

³²*Smith v. Britt*, 8 N. Y. Week. Dig. 76.

³³*Hilborne v. Kolle*, 2 N. Y. Week. Dig. 182.

³⁴*Beadleston v. Alley*, 28 N. Y. S. R. 89, 7 N. Y. Supp. 747.

³⁵*Petty v. Metropolitan Street R. Co.* 33 Misc. 738, 68 N. Y. Supp. 730.

³⁶*Parkinson v. Scott*, 5 Misc. 261. 31 Abb. N. C. 44, 25 N. Y. Supp. 102.

³⁷*Clossey v. Ayers*, 63 Hun, 624, 17 N. Y. Supp. 278; *Agar v. Tibbets*, 56 Hun, 272, 18 N. Y. Civ. Proc. Rep. 338, 30 N. Y. S. R. 456, 9 N. Y. Supp. 591.

of the summons.³⁸ But the plaintiff will not be allowed to discontinue without the payment of costs where he does not show a good excuse and the defendant has been put to the expense of a trial.³⁹ Nor will he be allowed to amend his complaint and leave out a defendant who has answered without the payment of costs.⁴⁰

59. How order obtained.—The plaintiff may obtain an order of discontinuance *ex parte*, in an action at law, where the answer does not set up a counterclaim, nor an affirmative defense, if the order provides for the payment of costs up to that time to the defendant;⁴¹ or where it sets up a counterclaim and the time to reply has not expired and that, too, whether the action be one at law or in equity.⁴²

The defendant may by an order granted upon notice have leave to enter judgment of discontinuance, unless the plaintiff consent to withdraw the order of discontinuance.⁴³

60. Two bills of costs.—The plaintiff will be ordered to pay two bills of costs upon an order of discontinuance, where there are two defendants and the summons and complaint were served upon them at such an interval of time that it necessitated the serving of two answers;⁴⁴ or when he has brought two actions when he could have obtained the relief sought in one action;⁴⁵ or there is a stipulation in three actions that two await the out-

³⁸*Lewis v. Germond*, 1 Paige, 300. *Smith v. Sutherland*, 4 Abb. Pr. 15,

³⁹*Layman v. New York Bank Note Co.* 20 N. Y. Supp. 431. 1 Hilt. 265; *Cohn v. Anathan*, 16 N. Y. Civ. Proc. Rep. 178, 24 N. Y. S. R. 295, 4 N. Y. Supp. 97.

⁴⁰*Chase v. Dunham*, 1 Paige, 572.

⁴¹*Angier v. Hager*, 45 App. Div. 32, 60 N. Y. Supp. 811; *Carlton v. Darcy*, 75 N. Y. 375; *Re Butler*, 101 N. Y. 307, 4 N. E. 518; *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293; *Walker v. Russell*, 7 Abb. Pr. 452 note, 16 How. Pr. 91; *Lindsay v. Deafendorf*, 43 How. Pr. 90.

⁴²*Angier v. Hager*, 45 App. Div. 32, 60 N. Y. Supp. 811; *Carlton v. Darcy*, 75 N. Y. 375; *Re Butler*, 101 N. Y. 307, 4 N. E. 518; *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293; *Walker v. Russell*, 7 Abb. Pr. 452 note, 16 How. Pr. 91; *Lindsay v. Deafendorf*, 43 How. Pr. 90. ⁴³*Lowerre v. Vail*, 5 Abb. Pr. 229.

⁴⁴*Scaboard & R. R. Co. v. Ward*, 18 Barb. 595, 1 Abb. Pr. 46; *Oak-*

come of the third, and the order is made after the third case is decided.⁴⁶

Only one bill of costs will be imposed as a condition of discontinuing an action brought against two defendants where they needlessly appeared by separate attorneys, and it appears that the debtor was a corporation, and not a partnership,⁴⁷ where there were many defendants who appeared by two attorneys, and the plaintiff could not proceed on account of facts disclosed after the commencement of the action, only one bill of costs was imposed as a condition of discontinuance.⁴⁸ Costs to the attorney of the common council of a city will not be allowed upon the discontinuance of an action against the city and the common council, where the city attorney should have appeared for both; but costs will be allowed to any defendant, where his interest demanded a separate attorney.⁴⁹

61. Rights of defendant.—One of several joint defendants may refuse to accept a discontinuance without costs when his codefendants have settled, but in that case he will be compelled to try the case on the issues already joined.⁵⁰

A defendant is entitled to costs upon an order of discontinuance where the complaint states that no personal claim is made against him, but no notice to that effect as provided in § 423 of the Code of Civil Procedure is served. The court sometimes allows motion costs in addition, and sometimes refuses them.⁵¹

62. When a trial fee is allowed.—Although the case is on the day calendar when the plaintiff is allowed to discontinue upon the payment of costs, the defendant cannot tax a trial fee.⁵²

⁴⁶*Stallman v. Kimberly*, 33 N. Y. S. R. 813, 11 N. Y. Supp. 518.

⁴⁷*Clark v. Wood*, 9 Wend. 435.

⁴⁸*Ackroyd v. Newton*, 24 Misc. 424, 53 N. Y. Supp. 682.

⁴⁹*Wohlman v. Goff*, 15 N. Y. Civ. Proc. Rep. 39, 4 N. Y. Supp. 210.

⁵⁰*Oelberman v. Rosenbaum*, 15 N. Y. Civ. Proc. Rep. 389, 4 N. Y. Supp. 210; *Sutphen v. Lash*, 10 Hun, 120; *Lockwood v. Salmon River Paper Co.*, 49 N. Y. S. R. 302, 20 N. Y. Supp. 429.

⁵¹*Hequenbourg v. Bookstaver*, 54 Hun, 88, 26 N. Y. S. R. 479, 7 N. Y. Supp. 217.

A trial fee will be allowed where the defendant has moved for a dismissal of the complaint when the case is reached.⁵³

A trial fee will not be allowed where the defendant has settled the case unbeknown to his attorney, who places the case on the calendar and takes a default.⁵⁴

63. Discontinuance in equity actions.—In equity actions the same rule applies as in actions at law, in regard to terms of discontinuance.⁵⁵

In an action to abate a nuisance a plaintiff was allowed to discontinue upon the payment of motion costs, where the referee refused to send in his report on the ground that he did not know how to decide the question, and the defendant had abated some of the nuisances complained of.⁵⁶ An executor who is appointed after the removal of a former executor will not be allowed to discontinue an action without costs when the order removing his predecessor is reversed, if the action could have been brought in his own name.⁵⁷

Where the representatives of a deceased plaintiff are unwilling to proceed in a case, an order of discontinuance with costs against the representatives in their representative capacity should be entered.⁵⁸ An order of discontinuance will be set aside where a mistake has been made by one party in omitting the stenographer's bill.⁵⁹

In a partition action where the owners of the property sold the premises, the plaintiff was allowed to discontinue upon payment of motion costs to a defendant who had been made a party at his own request, on the ground that he had a right to

⁵³*Lockwood v. Salmon River Paper Co.* 49 N. Y. S. R. 302, 20 N. Y. Supp. 682; *Cooke v. Beach*, 25 How. Pr. 356.

⁵⁴*Jones v. Case*, 38 How. Pr. 349; *Ehlers v. Willis*, 63 How. Pr. 341.

⁵⁵*Hood v. Hood*, 12 Daly, 113.

⁵⁶*Pilger v. Gore*, 12 Abb. Pr. 244.

⁵⁷*Banta v. Marcellus*, 2 Barb. 373.

⁵⁸*Adams v. Moore*, 22 Misc. 451.

⁵⁹*Ackroyd v. Newton*, 24 Misc. 424, N. Y. Supp. 718.

distribute the proceeds of the sale.⁶⁰ But no costs upon discontinuance will be allowed to a defendant when it was not necessary for him to appear.⁶¹ Where the plaintiff is allowed to discontinue upon payment of costs, he will be obliged to pay all costs regularly and in good faith incurred by the defendant after the granting of the order of discontinuance, and before the order is served on the defendant.⁶²

64. Discontinuance when a receiver has been appointed or an injunction granted.—In the order of discontinuance of an action in which a receiver of the property in question has been appointed, or temporary injunction granted, there should be a provision that the plaintiff was not entitled to the receiver or the injunction, and a reference to ascertain the damage may be provided in the order;⁶³ or the defendant may be left to his proceedings to fix the amount of liability.⁶⁴

65. Discontinuance after appeal.—The special term has no power to allow a plaintiff to discontinue without costs, after the appellate court has reversed a judgment in favor of the plaintiff with costs to abide the event, as such an order would be a substantial modification of the order of reversal. The event provided for in the order of reversal meant the determination of the action either by judgment or discontinuance.⁶⁵

66. Additional allowance upon a discontinuance.—Upon the discontinuance of a difficult and extraordinary case, it is proper to grant an extra allowance in addition to costs as a condition for such leave.⁶⁶ This question will be determined upon the

⁶⁰*Wocman v. Baas*, 39 N. Y. S. R. 922, 15 N. Y. Supp. 469.

⁶¹*Gallagher v. Egan*, 2 Sandf. 742; *Merchants' Ins. Co. v. Marvin*, 1 Paige, 557.

⁶²*Hall v. Lindo*, 8 Abb. Pr. 341.

⁶³*Sweetzer v. Smith*, 27 N. Y. S. R. 628, 8 N. Y. Supp. 156.

⁶⁴*Peet v. Kimball*, 58 App. Div. 329, 68 N. Y. Supp. 1010.

⁶⁵*Van Wyck v. Baker*, 11 Hun. 309.

⁶⁶*Robins v. Gould*, 1 Abb. N. C. 133; *McComb v. Kellogg*, 13 N. Y.

Civ. Proc. Rep. 150, 28 N. Y. Week. Dig. 154; *Tubbs v. Hall*, 12 Abb. Pr. N. S. 237; *Dambman v. Schutting*, 6

Hun, 29, 51 How. Pr. 357; *Coffin v.*

Coke, 4 Hun. 616; *Society of New York Hospital v. Coe*, 15 Hun, 440;

Jaffray v. Goldstone, 62 Hun, 52, 41 N. Y. S. R. 901, 16 N. Y. Supp. 430;

Stallman v. Kimberly, 33 N. Y. S. R.

situation of the case at the time of the order of discontinuance.⁶⁷

The court has power to impose an additional allowance as a condition of an order of discontinuance, even if the defendant does not make a motion for an extra allowance.⁶⁸ When a plaintiff has obtained *ex parte* an order of discontinuance, the defendant may, before taxation of costs, move for an additional allowance.⁶⁹ But the court has no right to impose a condition that the plaintiff sign a stipulation not to bring another action for the same cause.⁷⁰

67. Discontinuance in special proceedings.—The court may grant an order of discontinuance in a special proceeding and may impose as a condition of making such an order the payment of more than taxable costs,⁷¹ or nothing at all.⁷²

68. Refusal of plaintiff to accept terms of discontinuance.—The plaintiff is not bound to accept a discontinuance upon the conditions imposed by the court. His refusal so to do is simply a denial of the motion for discontinuance;⁷³ or he may serve a notice that he elects not to discontinue.⁷⁴

The plaintiff will not be allowed costs of motion upon the granting of his motion for an order discontinuing without costs. When such an order is made it will be considered as inadvertently made and should be resettled;⁷⁵ or an appeal will lie from such an order.⁷⁶

813, 11 N. Y. Supp. 518; *Bright v. Milwaukee & St. P. R. Co.* 1 Abb. N. Y. 478; *Re White Plains*, 65 App. N. C. 14; *Folsom v. Van Wagner*, 7 Div. 417, 72 N. Y. Supp. 1026.

Lans. 309, 14 Abb. Pr. N. S. 44; *Re Wells Avenue Sewer*, 46 Hun, Brown v. Safeguard Ins. Co. 7 Abb. 534, 28 N. Y. Week. Dig. 125.

Pr. 345. *Re Waverly Waterworks Co.* 85 N. Y. 478.

Angier v. Hager, 51 App. Div. 171, 64 N. Y. Supp. 692. *Society of New York Hospital v. Coe*, 15 Hun, 440.

Jaffray v. Goldstone, 62 Hun, 52, 41 N. Y. S. R. 901, 16 N. Y. Supp. 430. *Elliott v. Vermilyea*, 28 Misc. 790, 59 N. Y. Supp. 181.

Angier v. Hager, 51 App. Div. 171, 64 N. Y. Supp. 692. *Elliott v. Vermilyea*, 27 Misc. 189, 57 N. Y. Supp. 218.

Kilmer v. Evening Herald Co. 70 App. Div. 291, 75 N. Y. Supp. 243.

Where an action is discontinued without costs, the order entered is a kind of final judgment, and all costs theretofore granted in that action are merged in the final judgment. There is then nothing due the defendant in that action.⁷⁷

69. Protection of attorney upon a discontinuance.—The court will not allow the plaintiff to discontinue where the parties have settled the action collusively for the purpose of defrauding the plaintiff's attorney out of his costs, except upon the payment of the costs to the attorney.⁷⁸

Where the plaintiff's attorney has been retained upon a contingent fee, the court will not allow a discontinuance until he is paid, and in a proper case may order that he be paid taxable costs and an extra allowance.⁷⁹ But where the defendant's attorney served an answer after he knew that his client had settled the action, the plaintiff will be allowed to discontinue without costs.⁸⁰

70. Order to be entered upon discontinuance.—It is the duty of the defendant to have his costs taxed where the discontinuance was upon the condition that the plaintiff pay the defendant's costs.⁸¹ Likewise if the appellant elects to discontinue his appeal he must enter an order to that effect and pay the respondent his costs. The entry of the order without the payment of costs may be treated as a nullity.⁸² The defendant may move to dismiss the complaint, and the respondent to dismiss the appeal, when the costs are not paid.⁸³ But it is irregular for the defendant to enter the order of discontinuance and tax his costs if the costs are not paid.⁸⁴

⁷⁷*Michael v. Wenning*, 1 N. Y. City Ct. Rep. 479. *Twined*, 5 Hun, 382. Affirmed in 63 N. Y. 202.

⁷⁸*Filer v. Korn*, 3 Misc. 624, 52 N. Y. S. R. 266, 23 N. Y. Supp. 115. ⁸²*Burnett v. Harkness*, 4 How. Pr. 158, 2 N. Y. Code Rep. 100; *Morrison v. Ide*, 4 How. Pr. 304, 3 N. Y. Code Rep. 27.

⁷⁹*Byron v. Durrie*, 6 Abb. N. C. 136. ⁸³*Buffalo & A. R. Co. v. Johnson*, 42 N. Y. 215.

⁸⁰*Howard v. Riker*, 11 Abb. N. C. 113.

⁸¹*Angier v. Hager*, 51 App. Div. 171, 64 N. Y. Supp. 692; *People v.* ⁸⁴*Hicks v. Brennan*, 10 Abb. Pr. 304.

When the costs are well understood there is no need of having them taxed by the clerk, but the order may recite what costs should be paid as the price of the granting of the order of discontinuance.⁸⁵

⁸⁵*Richardson v. Thedford*, 5 App. Div. 404, 29 N. Y. Supp. 307.

CHAPTER VI.

DELAYING TRIAL AND MOTION FOR A NEW TRIAL.

71. Withdrawing a juror.
72. Adjourning trial.
73. Motion for new trial made without case.
74. New trial in ejectment actions.
75. New trial on account of error of jury.
76. Waiver of right to costs.
77. New trial on account of error of court.
78. New trial on account of error of referee.
79. New trial in justice's court, because the verdict is against the weight of evidence.
80. New trial on the ground of newly discovered evidence.
81. What is included in "Costs of former trial."
82. Additional allowance upon the first trial.
83. What items are taxable.
84. Motion for new trial made on two grounds.
85. Correction of order.
86. What courts have power to exercise discretion as to terms of a new trial.
87. Motion for a new trial made on a case.
88. Appeal from an order granting new trial.

71. Withdrawing a juror.—The terms usually imposed upon the party asking to withdraw a juror are the payment of all costs to date. This includes not only disbursements, but also a trial fee.¹

Where a party is allowed to withdraw a juror upon the payment of certain costs within twenty days, and the costs are not paid within that time, the opposite party can have the clerk enter up judgment in his favor, upon proof of the noncompliance with the order.²

The costs thus paid cannot be taxed again by either party.³

¹*Byrne v. Brooklyn City & N. R.* see *Hayward v. Manhattan R. Co.* 6 Misc. 6, 58 N. Y. S. R. 121, 52 Hun. 383, 17 N. Y. Civ. Proc. Rep. 26 N. Y. Supp. 65; *Dewey v. Stewart*, 155, 24 N. Y. S. R. 357, 5 N. Y. Supp. 6 How. Pr. 465; *Chandler v. Bicknell* 5 Cow. 30.

²*Hanna v. Dexter*, 15 Abb. Pr. 135;

³*Byrne v. Brooklyn City & N. R.*

A full bill of costs could be taxed upon a final determination if the order allowing the withdrawal of a juror imposed as a condition the payment of a lump sum or an amount measured by the amount of the costs and disbursements to date.⁴

72. Adjourning trial.—The amount of costs that can be imposed upon the granting of an application to adjourn a trial is fixed by § 3255 of the Code of Civil Procedure at a sum not exceeding \$10, or in the city court of the city of New York a sum not exceeding \$5, besides the fees of witnesses and other taxable disbursements already made and incurred, which are rendered ineffectual by the adjournment. This applies to putting the case over the term, as well as adjourning the case to a later day in the term.⁵ If the parties cannot agree upon the amount of disbursements that must be adjusted by a taxation of those amounts, the same as upon a final determination of the action.⁶ It is sufficient to show that the party has become obligated to pay the different disbursements claimed, although the payment has not been actually made. It is no answer to a charge for witness fees that the witnesses have not attended the trial.⁷ The affidavit used upon the taxation of the costs must show that the expense had been already paid or incurred when the order to postpone was granted. The affidavit for witness fees must be the same as upon the taxation of costs upon final judgment, and must further show that the fees thus paid were rendered ineffectual by reason of the postponement.⁸

Co. 6 Misc. 6, 58 N. Y. S. R. 121, 26 *Kennedy v. Wood*, 54 Hun, 14, 17 N. Y. Supp. 65; *Marr v. Gross*, 2 N. Y. Civ. Proc. Rep. 375, 26 N. Y. Misc. 500, 23 N. Y. Civ. Proc. Rep. S. R. 34, 7 N. Y. Supp. 90.
97, 51 N. Y. S. R. 92, 22 N. Y. Supp. ⁷*Inderlied v. Whaley*, 4 Silv. Sup. Ct. 29, 17 N. Y. Civ. Proc. Rep. 377, 26 N. Y. S. R. 7, 7 N. Y. Supp. 74.

⁴*Schmidt v. Mackie*, 9 N. Y. Week. Dig. 288. ⁵*Lawson v. Hill*, 66 Hun, 288, 49 N. Y. S. R. 251, 20 N. Y. Supp. 904.

⁶*Shanks v. Rae*, 19 How. Pr. 540;

Disbursements for exemplification of records and official certificates cannot be taxed because the postponement of the trial has not rendered these useless.⁹

If the costs are not paid at once the opposite party should insist upon the trial proceeding, or apply for an order directing the payment of the costs imposed. An order directing the plaintiff to pay the costs cannot be entered without a further application to the court. If the proper order is not made, and the costs are not paid, they will be adjusted upon a final determination of the action.¹⁰ A party may pay the amount imposed by the court when it is in excess of the amount allowed by law, and then he can appeal from the order imposing the terms. The excess will be ordered refunded by the opposite party.¹¹ The court has not power to dismiss the plaintiff's complaint because he has not paid the costs imposed at a previous term of court, as a condition of putting the case over the term.¹²

73. Motion for new trial made without case.—All motion costs which are not otherwise specially regulated by the Code of Civil Procedure are in the discretion of the court under the provisions of § 3236 of the Code of Civil Procedure. But when motion costs are awarded the amount thereof is governed by § 3251 of the Code of Civil Procedure. Where a motion for a new trial is made without a case the amount of costs is \$10; where a motion for a new trial is made upon a case, or a motion is made for judgment upon a verdict rendered subject to the opinion of the court, or where exceptions are ordered to be heard, in the first instance, at a term of the appellate division of the supreme court,—the amount of costs is, before argument, \$20; for argu-

⁹*Morell v. Gould*, 5 Hill, 553.

¹¹*Kennedy v. Wood*, 54 Hun, 14,

¹⁰*Bulkeley v. Keteltas*, 2 Sandf. 17 N. Y. Civ. Proc. Rep. 375, 26 N. 735; *Gamble v. Taylor*, 43 How. Pr. Y. S. R. 34, 7 N. Y. Supp. 90.

Jackson ex dem. Pinkney v. Pell, 19 Johns. 270; *Kirby v. Sisson*, 78 N. Y. Supp. 2.

¹²*Hewitt v. Cook*, 75 App. Div. 239, 1 Wend. 83; *Slocum v. Watkins*, 1 Denio, 631; *Mix v. Brisbane*, 2 Wend. 286.

ment, \$10.¹³ When a motion is made for a new trial upon the judge's minutes under § 999 of the Code of Civil Procedure without a case, motion costs, and not costs of trial, may be allowed.¹⁴ The contrary was held under the Code of Procedure.¹⁵ This was on the ground that a trial, which is the judicial examination of the issues between the parties, was had whether a motion for a new trial was made on a case or on the judge's minutes. Section 999 of the Code of Civil Procedure makes a motion for a new trial upon the judge's minutes a motion, and not a trial.

74. New trial in ejectment actions.—The defendant in an action of ejectment must pay the allowance granted by the trial court, as well as other costs, when he takes a new trial under the provisions of § 1525 of the Code of Civil Procedure.¹⁶

75. New trial on account of error of jury.—The payment of the costs of the former trial will be imposed upon the granting of a motion for a new trial on account of the error of the jury,¹⁷ such that the verdict is against the weight of evidence,¹⁸ or is

¹³*Miller v. Bush*, 29 App. Div. 117, plaintiff to abide the event. Later 51 N. Y. Supp. 486; *Rouso v. Von-trin*, 41 How. Pr. 8; *Perkins v. Brainard Quarry Co.* 11 Misc. 337, 32 N. Y. Supp. 236; *Wilcox v. Daggett*, 15 N. Y. Week. Dig. 208; *Atkinson v. Truesdell*, 28 N. Y. S. R. 585, 7 N. Y. Supp. 801; *Hadley v. Petheal*, 23 N. Y. Civ. Proc. Rep. 216, 24 N. Y. Supp. 803. The case of *Davis v. Grand Rapids F. Ins. Co.* 5 App. Div. 36, 39 N. Y. Supp. 71, was decided by the same court consisting of the same judges who decided *Miller v. Bush*, and is not in harmony with the other cases cited. This case does not discuss the question whether motion costs are in the discretion of the court or not. A reference to the printed case on appeal shows that the motion for a new trial was denied, and the original order granted \$10 costs to the

an order was granted striking out all reference to costs, and the plaintiff taxed \$60 costs as a matter of right. The special term and the appellate division sustained the decision of the clerk. *Stewart v. J. Harper Bonnell Co.* 20 Misc. 174, 45 N. Y. Supp. 735, follows the case of *Davis v. Grand Rapids F. Ins. Co.*

¹⁴*Naugatuck Cutlery Co. v. Rowe*, 5 Abb. N. C. 142; *Newman v. French*, 45 Hun. 65, 27 N. Y. Week. Dig. 33, 9 N. Y. S. R. 492.

¹⁵*Muller v. Higgins*, 13 Abb. Pr. N. S. 297.

¹⁶*Wina v. De La Rionda*, 20 N. Y. Civ. Proc. Rep. 183, 37 N. Y. S. R. 404, 13 N. Y. Supp. 793.

¹⁷*Harrigan v. Hoosick Falls*, 16 N. Y. S. R. 352, 1 N. Y. Supp. 57; *Lawrence v. Wilson*, 86 App. Div. 472.

¹⁸*Kelly v. Frazier*, 27 Hun. 314, 2

not sustained by sufficient evidence,¹⁹ or is for inadequate²⁰ or excessive damages.²¹

The imposition of the costs of the former trial, costs of opposing the motion for a new trial, and costs of the appeal from the judgment and order denying a new trial, is proper upon the reversal of such judgment and granting a new trial by the appellate court, where the new trial was granted because of the reversal of a judgment in another action which was the basis of recovery in the action under consideration.²²

In the first and third departments it is held that terms imposed upon granting a new trial on the ground that the verdict

- N. Y. Civ. Proc. Rep. 322; *Lyons v. Connor*, 53 App. Div. 475, 65 N. Y. Supp. 1085; *Bailey v. Park*, 5 Hun. 41; *Fleischman v. Yagel*, 16 Misc. 511, 38 N. Y. Supp. 523; *O'Brien v. Long*, 49 Hun. 80, 1 N. Y. Supp. 695; *O'Shea v. McLearn*, 15 N. Y. Civ. Proc. Rep. 69, 16 N. Y. S. R. 482, 1 N. Y. Supp. 407; *East River Bank v. Hoyt*, 22 How. Pr. 478; *Benedict v. Johnson*, 2 Lans. 97; *Seuall v. Lathrop*, 67 Hun. 651, 23 N. Y. Supp. 1154; *Young v. Stone*, 77 Hun. 395, 28 N. Y. Supp. 881; *Kennedy v. Harlem R. Co.* 3 Duer. 659; *Oreng v. Russell*, 28 How. Pr. 151; *Brock v. Barnes*, 40 Barb. 521; *Jackson ex dem. Livingston v. Thurston*, 3 Cow. 342; *Goodyear v. Ogden*, 4 Hill. 104; *Brown v. Bradshaw*, 1 Duer. 199; *Ward v. Woodburn*, 27 Barb. 354; *North v. Sergeant*, 33 Barb. 350, 14 Abb. Pr. 223, 20 How. Pr. 519; *Harris v. Panama R. Co.* 5 Bosw. 312; *Voorhees v. National Citizens' Bank*, 15 Abb. Pr. N. S. 13; *Baldwin's Bank v. Butler*, 38 N. Y. S. R. 983, 14 N. Y. Supp. 831; *Kummer v. Christopher & E. T. Street R. Co.* 3 Misc. 100, 51 N. Y. S. R. 770, 22 N. Y. Supp. 698; *Murphy v. Haswell*, 65 Barb. 380; *Wilson v. Lester*, 64 Barb. 431; *Landrigan v. Brooklyn Heights R. Co.* 23 App. Div. 43, 48 N. Y. Supp. 454; *Helgers v. Staten Island Midland R. Co.* 69 App. Div. 570, 75 N. Y. Supp. 34; *Fawdrey v. Brooklyn Heights R. Co.* 64 App. Div. 418, 72 N. Y. Supp. 283; *Cohen v. Brooklyn Heights R. Co.* 73 N. Y. Supp. 1132; *Harrington v. Brooklyn Heights R. Co.* 73 N. Y. Supp. 1136; *Curry v. New York & Q. C. R. Co.* 73 N. Y. Supp. 1132; *Peck v. Fonda, J. & G. R. Co.* 3 Silv. Sup. Ct. 10, 25 N. Y. S. R. 95, 3 N. Y. Supp. 379.
- ¹⁹*Young v. Stone*, 77 Hun. 395, 60 N. Y. S. R. 419, 28 N. Y. Supp. 881.
- ²⁰*Sloane v. McCawley*, 33 Misc. 652, 68 N. Y. Supp. 187; *Brown v. Foster*, 1 App. Div. 578, 73 N. Y. S. R. 94, 37 N. Y. Supp. 502; *O'Shea v. McLearn*, 15 N. Y. Civ. Proc. Rep. 69, 16 N. Y. S. R. 482, 1 N. Y. Supp. 407; *Riegelman v. Brunnings*, 36 App. Div. 351, 56 N. Y. Supp. 755; *Richards v. Sandford*, 2 E. D. Smith, 349, 12 N. Y. Legal Obs. 94.
- ²¹*Langley v. Sixth Ave. R. Co.* 16 Jones & S. 542; *Mahar v. Simmons*, 47 Hun. 479, 14 N. Y. S. R. 443; *Buck v. Webb*, 58 Hun. 185, 33 N. Y. S. R. 824, 11 N. Y. Supp. 617; *Harris v. Panama R. Co.* 5 Bosw. 312.
- ²²*Smith v. Frankfield*, 13 Hun. 489, Affirmed in 77 N. Y. 414.

is against the weight of evidence rests in the discretion of the court, which may or may not impose the payment of the costs of the former trial.²³

76. Waiver of right to costs.—Where a party intends to appeal from an order granting a new trial, he should apply for a stay. Still where he does not do so, but simply refuses to accept the costs pending his appeal, he does not waive the payment of the costs and if he is defeated upon his appeal, he can demand the payment of the costs first imposed.²⁴

Where a judge of his own motion sets aside a verdict and directs a new trial and makes no award of costs, objection to the order because it does not allow costs to the party securing the verdict must be taken at the time. If such objection is not then taken, such a refusal to award costs is not ground for a reversal upon an appeal from the order.²⁵

77. New trial on account of error of court.—Where a verdict is set aside because it is against the weight of evidence, and contrary to the law as contained in the judge's charge, the costs of the motion and of the former trial should be ordered to abide the event.²⁶ The moving party is asking for a right, and the court cannot impose the payment of costs as a condition.²⁷ The court sometimes compels the moving party to stipulate that he

²³*Cohen v. Krulwitech*, 77 App. Supp. 291; *Knapp v. Curtis*, 9 Wend. Div. 126, 78 N. Y. Supp. 1044; *People v. Glasgow*, 30 App. Div. 94, 52 N. Y. Supp. 24; *Lashaway v. Young*, 76 App. Div. 177, 78 N. Y. Supp. 366.

²⁴*Stokes v. Stokes*, 38 App. Div. 215, 56 N. Y. Supp. 637.

²⁵*Schmidt v. Brown*, 80 Hun. 183, 61 N. Y. S. R. 831, 30 N. Y. Supp. 68.

²⁶*Van Rensselaer v. Dole*, 1 Johns. Cas. 279, and note; *Smith v. New York*, 55 App. Div. 90, 8 N. Y. Anno. Cas. 339, 66 N. Y. Supp. 1046; *Henderson v. Henderson*, 2 Abb. N. C. 102; *Robbins v. Hudson River R. Co.* 7 Bosw. 1; *Brauer v. Oceanic Steam Nav. Co.* 66 App. Div. 605, 73 N. Y.

Supp. 291; *Knapp v. Curtis*, 9 Wend. Div. 126, 78 N. Y. Supp. 1044; *People v. Glasgow*, 30 App. Div. 94, 52 N. Y. Supp. 24; *Lashaway v. Young*, 76 App. Div. 177, 78 N. Y. Supp. 366.

²⁷*Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334.

will waive all costs if he succeeds, and that the opposite party may tax full costs if he succeeds.²⁸

78. New trial on account of error of referee.—Where the report of a referee is set aside as against the weight of evidence, costs are in the discretion of the court, and may be ordered to abide the event.²⁹ But costs should not be imposed when a new trial is granted on account of the misconduct of the referee.³⁰

79. New trial in justice's court, because the verdict is against the weight of evidence.—Upon an appeal from a judgment rendered in a justice's court, where a new trial is not demanded in the appellate court, the judgment may be reversed and a new trial ordered in the court below, conditioned upon the payment by the appellant of the sum of \$10.³¹

80. New trial on the ground of newly discovered evidence.—Payment of the costs of the former trial should be imposed as a condition of granting a new trial on the ground of newly discovered evidence.³²

The court, however, may impose the payment of a larger sum.³³

81. What is included in "Costs of former trial."—The costs of the former trial do not include all the costs of the action, but include the trial fee, witness fees, and other disbursements of that term, to be ascertained after notice of taxation, if the parties

²⁸*Seggerman v. Metropolitan Street R. Co.* 38 Misc. 374, 77 N. Y. Supp. 905. ³²*Comstock v. Dye*, 13 Hun, 113; *Simmons v. Fay*, 1 E. D. Smith, 107; *Whitney v. Saxe*, 15 N. Y. Civ. Proc.

²⁹*Wentworth v. Candee*, 17 How. Pr. 405; *Allard v. Mouchon*, 1 Johns. Cas. 280; *Smith v. Schanck*, 18 Barb. 344; *Seranton v. Baxter*, 4 Sandf. 8. ³⁰*O'Brien v. Long*, 49 Hun, 80, 17 N. Y. S. R. 510, 1 N. Y. Supp. 695. ³¹*Jacob v. Haeffelen*, 54 App. Div. 570, 66 N. Y. Supp. 1007; *Cunningham v. Nassau Electric R. Co.* 40 App. Div. 211, 58 N. Y. Supp. 22; ³³*Re Ryan*, 70 Hun. 149, 53 N. Y. S. R. 926, 24 N. Y. Supp. 277. Affirmed in 141 N. Y. 550, 57 N. Y. S. R. 865, 36 N. E. 343.

Code Civ. Proc. § 3063.

cannot agree. Costs of opposing the motion are usually allowed.³⁴

82. Additional allowance upon the first trial.—It has been held that the costs of the former trial do not include an additional allowance where the report of a referee was set aside, the reason being that such allowance could only be had on obtaining a judgment, and here a judgment had not been obtained.³⁵

But where a verdict was set aside upon the payment of costs subsequent to the notice of trial, it was held that this included an additional allowance, because it was a part of the costs of the trial.³⁶

83. What items are taxable.—It has been held that the item for proceedings subsequent to notice, and before trial is allowable under an order granting a new trial upon payment of costs "after notice of trial" on the ground that this item is compensation for preparing for trial, subpoenaing witnesses, etc.³⁷

Term fees for terms that the case was on the calendar, but not tried, are not included within the terms "after notice of trial"³⁸ in an order granting a new trial.

The words "after notice of trial" in such an order mean from and after notice of trial, excluding that item and commencing with the first costs accruing thereafter.³⁹

Where a new trial is granted with costs to the moving party to abide the event, and upon the new trial a verdict is rendered for the same party as before, the successful party cannot tax the

³⁴*Buck v. Webb*, 58 Hun, 185, 33 N. Y. S. R. 824, 11 N. Y. Supp. 617; *M'Quade v. New York & E. R. Co.*, 5 Duer, 613, 11 How. Pr. 434; *Smith v. Frankfield*, 13 Hun, 489. Affirmed in 77 N. Y. 414; *Ellsworth v. Gooding*, 8 How. Pr. 1.

³⁵*Hicks v. Waltermire*, 7 How. Pr. 523. *Contra*, *M'Quade v. New York & E. R. Co.* 5 Duer, 613, 11 How. Pr. 434.

³⁶*Ellsworth v. Gooding*, 8 How. Pr. 511, 38 N. Y. Supp. 523.

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³⁷*Keil v. Rice*, 24 How. Pr. 228; *Mitchell v. Westervelt*, 6 How. Pr. 265. Affirmed in 6 How. Pr. 311, note; *Buckingham v. Minor*, 18 How. Pr. 287; *Dewey v. Stewart*, 6 How. Pr. 465. Doubled in *Fleischman v. Yagel*, 16 Misc. 511, 38 N. Y. Supp. 523.

³⁸*Fleischman v. Yagel*, 16 Misc. 511, 38 N. Y. Supp. 523.

³⁹*Fleischman v. Yagel*, 16 Misc. 511, 38 N. Y. Supp. 523.

costs of motion; the motion costs were discretionary and the court having fairly exercised its discretion, the order is final as it was not appealed from.⁴⁰

84. Motion for new trial made on two grounds.—Where a motion for a new trial is made on exceptions taken and because of the insufficiency of the evidence, and the order is granted upon the payment of the costs of the former trial, but is silent as to the grounds of the order, the order will be upheld as being made on the ground of lack of evidence.⁴¹ If the order does not show the grounds upon which the new trial was granted, it will be presumed that it was granted because the verdict was against the weight of evidence, or that in the opinion of the trial court substantial justice will be promoted thereby.⁴²

85. Correction of order.—Where an order denying a motion for a new trial makes no award of costs, and the successful party enters the order with costs, he should upon discovering his mistake move for permission to vacate the order and ask the court to pass upon the question of costs. The court cannot pass upon the question of costs upon deciding a motion by the defeated party to correct the order, as the party successful upon the motion for a new trial is not before the court asking any relief.⁴³

86. What courts have power to exercise discretion as to terms of a new trial.—The granting or denying a motion for a new trial is to a certain extent discretionary, and the appellate division of the same court in which the motion was originally made can exercise its discretion, when the order of the trial court is brought before it for review, and it may modify the order.⁴⁴ But the appellate court could only review such an order

⁴⁰*Hadley v. Pethcal*, 23 N. Y. Civ. Hun. 9, 31 N. Y. Supp. 612; *Young Proc. Rep.* 216, 24 N. Y. Supp. 803. *v. Stone*, 77 Hun. 395, 28 N. Y. Supp.

⁴¹*Henderson v. Henderson*, 2 Abb. 881; *Glossford v. Lewis*, 82 Hun. 46, N. C. 102. 31 N. Y. Supp. 162.

⁴²*Fleischman v. Yagel*, 16 Misc. 511, 74 N. Y. S. R. 43, 38 N. Y. ⁴³*Siegrist v. Holloway*, 7 N. Y. Civ. Proc. Rep. 58.

Supp. 523; *Grening v. Malcom*, 83 ⁴⁴*Funk v. Evening Post Pub. Co.* COSTS 7.

upon an appeal from another court in those cases in which it can review any other discretionary order, as where there is a palpable abuse of discretion, etc.

87. Motion for a new trial made on a case.—The costs awarded to the successful party upon a motion for a new trial on a case are the same as upon an appeal as prescribed in subd. 4, § 3251 of the Code of Civil Procedure.⁴⁵ The party successfully opposing the motion is entitled to those costs.⁴⁶

These costs are chargeable even when the motion is made prematurely, when the party has had the benefit of the motion.⁴⁷ The moving party is not entitled to these costs.⁴⁸

Only motion costs can be allowed upon a motion for a new trial upon a case when the time to appeal has expired.⁴⁹

Two fees for argument can be taxed where the motion is argued before one judge who does not decide it, but sends it to another judge, who denies the motion.⁵⁰ The successful party will be allowed to retax his costs at the proper amount, where he has inadvertently taxed simple motion costs.⁵¹

When the whole office of a case is to enable the court to ascer-

76 Hun, 497, 59 N. Y. S. R. 333, 27 N. Y. Supp. 1089.

⁴⁵ Code Civ. Proc. § 3251, subdiv. 3. See motion for new trial made without a case, § 73, *supra*.

⁴⁶ *Reid v. Guedke*, 38 App. Div. 107, 29 N. Y. Civ. Proc. Rep. 212. 57 N. Y. Supp. 414; *Garvey v. United States Horse & Cattle Show Soc.* 1 N. Y. Anno. Cas. 406, 73 N. Y. S. R. 360, 38 N. Y. Supp. 171; *Atkinson v. Truesdell*, 28 N. Y. S. R. 585, 7 N. Y. Supp. 801; *Wilcox v. Daqgett*, 15 N. Y. Week. Dig. 208; *Perkins v. Brainard Quarry Co.* 11 Misc. 337, 65 N. Y. S. R. 417, 32 N. Y. Supp. 236; *Fleischman v. Yagel*, 16 Misc. 511, 74 N. Y. S. R. 43, 38 N. Y. Supp. 523; *Stewart v. J. Harper Bonnell Co.* 20 Misc. 174, 45 N. Y. Supp.

735; *Davis v. Grand Rapids F. Ins. Co.* 5 App. Div. 36, 39 N. Y. Supp. 71; *Christ v. Chetwood*, 8 Misc. 81, 58 N. Y. S. R. 815, 28 N. Y. Supp. 1148; *Whitney v. Saxe*, 15 N. Y. Civ. Proc. Rep. 450, 18 N. Y. S. R. 1020, 2 N. Y. Supp. 653.

⁴⁷ *Rousso v. Vontrin*, 41 How. Pr. 8. ⁴⁸ *Wilson v. Abbott*, 68 N. Y. Supp. 867. *Contra*, *Pilgrim v. Donnelly*, 1 How. Pr. N. S. 281, 15 Abb. N. C. 240.

⁴⁹ *Forstman v. Schutting*, 28 Hun. 482.

⁵⁰ *Guckenheimer v. Angerine*, 16 Hun, 453.

⁵¹ *Whitney v. Saxe*, 15 N. Y. Civ. Proc. Rep. 450, 18 N. Y. S. R. 1020, 2 N. Y. Supp. 653.

tain whether the new evidence is cumulative merely, only motion costs are chargeable.⁵²

The moving party, although successful, must, as a condition of obtaining a new trial, pay the costs of the former trial.⁵³

Costs are in the discretion of the court upon the decision of a motion made for a new trial, which is ordered to be heard at the appellate division in the first instance. If no costs are awarded none can be taxed.⁵⁴

Whether costs that a party has paid for the granting of a new trial as a favor can be again taxed should be decided upon the same principle as is applied in similar indulgences in opening defaults and allowing amendments.⁵⁵

88. Appeal from an order granting new trial.—A party may pay costs that have been improperly granted against him, and accept the provisions of the order, and then appeal from so much of the order as imposes costs.⁵⁶

Where upon a motion for a new trial because the verdict is against the weight of evidence, the attention of the court is not called to the fact that such motions are not usually granted except upon the payment of the costs of the trial, the appellate court will not listen to that point upon an appeal from an order granting a new trial which does not impose the payment of the costs of the previous trial.⁵⁷

⁵²*Hossley v. Colerick*, 3 How. Pr. N. S. 169, 9 N. Y. Civ. Proc. Rep. 43. ⁵⁵*Kummer v. Christopher & T. Street R. Co.* 12 Misc. 387, 24 N. Y.

⁵³*Hossley v. Colerick*, 3 How. Pr. Civ. Proc. Rep. 404, 67 N. Y. S. R. N. S. 169, 9 N. Y. Civ. Proc. Rep. 43; 404, 33 N. Y. Supp. 581.

Comstock v. Dye, 13 Hun, 113; *Simmons v. Fay*, 1 E. D. Smith, 107; *O'Brien v. Long*, 49 Hun, 80, 17 N. Y. S. R. 510, 1 N. Y. Supp. 695.

Bonyng v. Waterbury, 12 Hun, 534. ⁵⁷*Feiber v. Lester*, 36 N. Y. S. R. 986, 13 N. Y. Supp. 339.

274; *Peck v. Cohen*, 8 Jones & S. 142.

⁵⁴*Miller v. Bush*, 29 App. Div. 117, 51 N. Y. Supp. 486.

CHAPTER VII.

COSTS UPON THE DECISION OF A DEMURRER.

89. Absolute right to costs in actions at law.
90. In actions which involve questions of law and fact.
91. Where both parties are successful.
92. Separate bills of costs, where there are two or more parties on the successful side.
93. What items are taxable.
94. Judgment upon frivolous demurrer.
95. When successful party cannot tax costs.
96. Amendment of pleading to obviate defect pointed out by demurrer.
97. Judgment entered upon decision of demurrer.
98. Final or interlocutory judgment.
99. Costs by whom taxed.

89. Absolute right to costs in actions at law.—The right of the successful party to the costs upon the decision of a demurrer to the whole complaint in an action at law is absolute, unless the case comes within the exceptions of § 3232 of the Code of Civil Procedure, which provides that “where an issue of law and an issue of fact are joined, between the same parties to the same action, and the issue of fact remains undisposed of, when an interlocutory judgment is rendered upon the issue of law, the interlocutory judgment may, in the discretion of the court, deny costs to either party, or award costs to the prevailing party, either absolutely, or to abide the event of the trial of the issue of fact.”¹ It makes no difference that the party defeated is a public official.² Where a defendant could have demurred to a

¹*Adams v. Ward*, 60 How. Pr. 288; *fiers v. Belmont*, 24 N. Y. Civ. Proc. *Tallman v. Bernhard*, 75 Hun, 30, 31 Rep. 408, 67 N. Y. S. R. 329, 33 N. Y. Abb. N. C. 84, 23 N. Y. Civ. Proc. Supp. 623; *Childs v. Algie*, 4 Month. Rep. 284, 58 N. Y. S. R. 597, 27 L. Bull. 17.
N. Y. Supp. 6; *Marsh v. Graham*, 19 ²*Keller v. Shradly*, 30 Misc. 833, 61 Mi-c. 263, 44 N. Y. Supp. 253; *Oli* N. Y. Supp. 1123.

complaint, but prefers to raise the question upon the trial, and succeeds, he should be allowed no more discretionary costs than he would have been allowed upon a demurrer.³

90. In actions which involve questions of law and fact.—The court, having discretion to award costs upon the decision of a demurrer in an action at law, where there are issues of law to be tried, cannot, after it has decided that a party is entitled to costs, limit the amount of costs. The successful party is entitled to the statutory costs as allowed by § 3251 of the Code of Civil Procedure.⁴

The costs awarded in such a case cannot be entered in a judgment and collected, until final judgment is rendered upon the issues in the action generally.⁵

There are special term decisions which hold that costs may be awarded upon the determination of a demurrer, although other issues were left undetermined.⁶ The law is better determined in the decisions of the New York common pleas and of the general term of the fifth department, which hold that the costs upon such a demurrer must await the trial of the issues of fact, and that the party successful upon the demurrer must also be successful upon the trial of the issue of fact to recover the costs of the demurrer.⁷ The history of these costs is given in the case last cited,⁸ and the conclusion there arrived at by the editor, that the court erred in this decision because its attention was not called to the provisions of the present Code on this subject, seems to be correct.

³*Barnes v. Seligman*, 55 Hun. 339. Hun. 570; *Fales v. Lawson*, 4 N. Y. 29 N. Y. S. R. 63, 8 N. Y. Supp. 834. Supp. 284; Code Civ. Proc. § 3233.

⁴*Vogt Mfg. & Coach Lace Co. v. Doelger v. O'Rourke*, 18 Abb. N. C. Oettinger, 88 Hun. 52, 68 N. Y. S. R. 457, 12 N. Y. Civ. Proc. Rep. 254; 549, 34 N. Y. Supp. 731. *Adams v. Ward*, 60 How. Pr. 288.

⁵*Biershenk v. Stokes*, 46 N. Y. S. R. 179, 18 N. Y. Supp. 854; *Oester- Schenck v. Rowell*, 2 Month. L. riches v. Jones, 45 Hun. 246, 13 N. Y. Bull. 18; *Willlover v. First Nat. Bank*, 40 Hun. 184, 10 N. Y. Civ. Proc. Rep. 98, 10 N. Y. S. R. Proc. Rep. 80.

356; *Robinson v. Hall*, 35 Hun. ⁸Note to *Willlover v. First Nat. Bank*, 10 N. Y. Civ. Proc. Rep. 80. 214; *Armstrong v. Cummings*, 22

91. Where both parties are successful.—Costs are not awarded to either party where a demurrer has been interposed to two or more causes of action, or counterclaims, and it is sustained in part and overruled in part.⁹

92. Separate bills of costs, where there are two or more parties on the successful side.—Separate bills of costs must be awarded to the different defendants, when they have succeeded upon the decision of a demurrer if they are not united in interest and have appeared by different attorneys.¹⁰

The plaintiff, upon the decision of a demurrer in his favor, is not entitled to tax a separate bill of costs against defendants who have appeared by the same attorney, but have answered separately.¹¹

93. What items are taxable.—Upon the entry of a final judgment upon the decision of a demurrer, the successful party in an action at law is entitled to tax a full bill of costs.

Upon the entry of an interlocutory judgment, where the defeated party is given leave to plead over upon the payment of costs, the successful party is entitled to tax costs after notice and before trial, \$15, trial fee \$20, and disbursements.¹² The

⁹*Benner v. Benner*, 35 N. Y. S. R. Co. 10 How. Pr. 154; *Miller v.* 602, 12 N. Y. Supp. 472; *Petrakion Coates*, 2 Hun, 668, 5 Thomp. & C. v. *Arbeely*, 23 N. Y. Civ. Proc. Rep. 690.

183, 26 N. Y. Supp. 731; *Sargent v.* ¹⁰*Buell v. Gay*, 13 How. Pr. 31. *Sargent Granite Co.* 3 Misc. 325, 52 *Contra. Comstock v. Halleck*, 4 N. Y. S. R. 517, 23 N. Y. Supp. 886; *Sandf.* 671.

Hollingshed v. Woodward, 35 Hun, 410. ¹²*Garrett v. Wood*, 61 App. Div. 294, 70 N. Y. Supp. 359; *Jones v.*

¹⁰*Officers v. Belmont*, 24 N. Y. Civ. Proc. Rep. 408, 67 N. Y. S. R. 329. *Butler*, 83 Hun. 91, 1 N. Y. Anno. Cas. 278, 63 N. Y. S. R. 814, 31 N. Y. S. R. 106, 5 N. Y. Supp. 623; *Delaware, L. & Supp.* 401. Reversed on other grounds *W. R. Co. v. Burkard*, 40 Hun. 625; in 146 N. Y. 55, 65 N. Y. S. R. 772. *Lane v. Van Orden*, 11 Abb. N. C. 41 N. E. 633; *Louis v. Empire State* 228, 63 How. Pr. 237; *New York v. Ins. Co.* 75 Hun. 364, 23 N. Y. Civ. *Brady*, 25 Jones & S. 14, 25 N. Y. Proc. Rep. 295, 56 N. Y. S. R. 766. S. R. 106, 5 N. Y. Supp. 179, Affirmed 27 N. Y. Supp. 83; *Marsh v. Graham*, in 115 N. Y. 599, 26 N. Y. S. R. 340, 19 Misc. 263, 44 N. Y. Supp. 253; 22 N. E. 237; *Collomb v. Caldwell*, *Skinner v. White*, 69 Hun. 127, 23 5 How. Pr. 336. N. Y. Code Rep. N. Y. Supp. 384; *Edson v. Dillaye*, N. S. 41; *Wood v. Brooklyn F. Ins.* 8 How. Pr. 273; *Phipps v. Van Cott*,

disbursements allowed are those connected with the argument of the demurrer and the entry of the judgment thereon, and do not include costs of serving the summons and complaint, and sheriff's fees on execution.¹³

The defeated party should pay the costs of such proceedings as by the overruling of the demurrer will be vacated, entering judgment, satisfaction piece, transcript, and filing.¹⁴

There are some cases which hold that upon the sustaining of a demurrer, the successful party is entitled to tax costs before notice of trial.¹⁵ But these cases do not seem to be well considered and seem to be contrary to the general trend of the decisions.

In the New York city court only \$20 costs are allowed upon sustaining a demurrer to one of several defenses set up in the answer.¹⁶

94. Judgment upon frivolous demurrer.—Upon an application for judgment on account of the frivolousness of a demurrer only motion costs can be allowed.¹⁸ Where, however, both parties treat a notice of application for judgment on account of frivolousness of the demurrer, as a notice of argument, and the court decides the question upon the merits, costs as upon a trial of an issue of law can be taxed, but motion costs cannot.¹⁹

15 How. Pr. 110; *Crary v. Norwood*, *Adams v. Ward*, 60 How. Pr. 288; 5 Abb. Pr. 219; *Anonymous*, 3 Sandf. *Van Valkenburgh v. Van Schaick*, 8 756; *Thompson v. Stanley*, 22 N. Y. How. Pr. 271; *Collomb v. Caldwell*, Civ. Proc. Rep. 348, 22 N. Y. Supp. 5 How. Pr. 336, N. Y. Code Rep. N. 897; *Nellis v. De Forrest*, 6 How. S. 41; *Hendricks v. Bouck*, 4 E. D. Pr. 413; *Van Valkenburgh v. Van Smith*, 461, 2 Abb. Pr. 360; *Consid-Schaick*, 8 How. Pr. 271. But see *crant v. Brisbane*, 7 Abb. Pr. 345

Kneering v. Lennon, 3 Misc. 247, 51 note, 1 Bosw. 644; *Thompson v. Stanley*, 22 N. Y. Supp. 775. *Stanley*, 22 N. Y. Civ. Proc. Rep. 348

¹³*Louis v. Empire State Ins. Co.* 22 N. Y. Supp. 897.
75 Hun, 364, 23 N. Y. Civ. Proc. Rep. ¹⁶*Basso v. Basso*, 19 Abb. N. C. 295, 56 N. Y. S. R. 766. 27 N. Y. 173.
Supp. 83.

¹⁵*Doelger v. O' Rourke*, 18 Abb. N. C. 457, 12 N. Y. Civ. Proc. Rep. 254; ¹⁸*Small v. Ludlow*, 1 Hilt. 307; *Roberts v. Clark*, 10 How. Pr. 451; *Rochester City Bank v. Rapclje*, 12 How. Pr. 26; Code Civ. Proc. § 537.

¹⁹*McWilliam v. Dayton*, 27 Misc. 828, 57 N. Y. Supp. 819.

95. When successful party cannot tax costs.—No costs upon the decision of a demurrer can be taxed in the final judgment, where they were given “to abide the event” and the party to whom they were thus awarded was defeated upon the other issues, because the costs were given only on the condition that the party successful on the demurrer should finally succeed.²⁰ Where the plaintiff had a technical cause of action to which the defendant demurred, the demurrer was overruled and judgment rendered for the plaintiff for 6 cents, with costs of the action to the defendant, under § 3229 of the Code of Civil Procedure.²¹

96. Amendment of pleading to obviate defect pointed out by demurrer.—The right of a party to serve an amended pleading in the place of the one which has given rise to the demurrer is undoubted. The right of the party demurring to costs upon the demurrer is subject to the right of the opposing party to amend.²² It is the general rule that a party may by amendment obviate the objection to his pleading whether the objection be taken by motion or by a pleading, provided, of course, that the time within which he may amend as of right has not expired.

There is one case to the contrary rendered upon an uncontested motion, and no decision was written.²³

There is no absolute right in the party defeated upon the trial of a demurrer, to serve another pleading in the place of the one disposed of in whole or in part by the demurrer. It rests in the sound discretion of the court whether or not a party will be allowed to do so. The terms usually imposed are the payment of the costs of the demurrer within a certain time, and if an appeal has been taken the costs of the appeal. After such a decision on appeal the successful party cannot obtain an extra al-

²⁰*Murphy v. Gold & Stock Teleg. Co.* 18 N. Y. Civ. Proc. Rep. 43, 27 N. Y. S. R. 39, 9 N. Y. Supp. 28.

²¹*Branagan v. Palmer*, 5 N. Y. Week. Dig. 521.

²²*Curry v. Blair*, 4 N. Y. Week.

²³*Roome v. Jennings*, 3 Misc. 413, 52 N. Y. S. R. 507, 23 N. Y. Supp. 666.

lowance and thus make it a part of the costs which the opposing party must pay for the privilege of serving an amended pleading.²⁴

When the decision of the appellate court simply gives to the defeated party permission to apply to the court below for leave to withdraw his demurrer and answer, the court, upon such application, may impose as terms for this favor the payment of, not only the regular costs, but also the payment of an extra allowance granted.²⁵

97. Judgment entered upon decision of demurrer.— Upon the decision of a demurrer to a part of the issues raised, an interlocutory judgment should be entered. If the demurrer is to all the issues unless leave to plead over be granted, a final judgment should be entered when an entire bill of costs can be taxed.²⁶

If the defeated party appeals from the interlocutory judgment, instead of pleading over, and does not stay the proceedings of his opponent pending the appeal, his opponent may enter up final judgment and tax his costs therein, when the time limited for pleading over has expired.²⁷

98. Final or interlocutory judgment.— The order sustaining or overruling a demurrer to a pleading, where leave is not granted to plead over, or when permission is given but is not accepted, authorizes a final judgment, and the successful party is entitled to a full bill of costs.²⁸

An interlocutory judgment is entered upon the decision of a demurrer, when permission is given to plead over upon payment

²⁴*McDonald v. Mallory*, 14 Jones & S. 58.

²⁵*Terry v. Moore*, 12 App. Div. 396, 42 N. Y. Supp. 51.

²⁶*Brassington v. Rohrs*, 3 Misc. 258, 23 N. Y. Civ. Proc. Rep. 146, 52 N. Y. S. R. 171, 22 N. Y. Supp. S. R. 535, 5 N. Y. Supp. 718; *Hoff-*

761; *Adams v. Wood*, 60 How. Pr. 288; Code Civ. Proc. §§ 3232, 3222, and 779.

²⁷*Hecla Consol. Gold Min. Co. v. O'Neill*, 23 N. Y. Civ. Proc. Rep. 143, 51 N. Y. S. R. 436, 22 N. Y. Supp. 130.

²⁸*Crasto v. White*, 52 Hun. 473, 17 N. Y. Civ. Proc. Rep. 46, 23 N. Y. S. R. 171, 22 N. Y. Supp. S. R. 535, 5 N. Y. Supp. 718; *Hoff-*

man v. Barry, 2 Hun, 52, 4 Thomp. 288; Code Civ. Proc. §§ 3232, 3222, & C. 253.

of costs, but if such privilege is not accepted within the time allowed, a final judgment is entered.²⁹ Before the adoption of the present Code, it was held that the costs granted upon the decision of a demurrer to a part of the issues raised by the pleadings were final, not interlocutory.³⁰ But these cases on this point have been rendered obsolete by the adoption of the present Code. §§ 3232 and 3233 of the Code of Civil Procedure.

99. Costs by whom taxed.—The order should expressly provide for the taxation of the costs before the clerk of the county in which the action is brought or before a judge, designating him.³¹

The general practice seems to be to have the costs taxed by the clerk in the usual way.³²

²⁹*Castro v. White*, 52 Hun, 473, 17 N. Y. Civ. Proc. Rep. 46, 23 N. Y. S. R. 535, 5 N. Y. Supp. 718; *Bernheimer v. Hartmayer*, 34 Misc. 346, 69 N. Y. Supp. 816. *strong v. Cummings*, 22 Hun, 570; *Palmer v. Smedley*, 13 Abb. Pr. 185. ³⁰*Marsh v. Graham*, 19 Misc. 263, 44 N. Y. Supp. 253; Code Civ. Proc. § 3262.

³¹*Mora v. Sun Mut. Ins. Co.*, 22 How. Pr. 60, 13 Abb. Pr. 304; *Arm-* ³²*Marsh v. Graham*, 19 Misc. 263, 44 N. Y. Supp. 253.

CHAPTER VIII.

COSTS AS REGULATED BY THE RELIEF SOUGHT AND BY THE JUDGMENT RENDERED.

100. Generally.

101. Action to recover real property.

a. When claim of title arises upon the pleadings.

(1) In general.

(2) Unnecessary allegations of title.

(3) United with another cause of action.

b. Ejectment.

c. The question of title to real estate must be involved.

d. Lack of jurisdiction.

e. Action for dower.

f. Trespass.

g. Plea of license.

h. Plea that the land is a highway.

i. Actions in relation to easements.

j. Actions between landlord and tenant.

k. Title to real estate proven as a matter of evidence.

l. Action commenced in a justice's court.

m. Power of the justice's court before removal of the action.

n. Action to abate a nuisance.

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104. Other actions where the recovery is less than \$50.

a. In general.

b. Actions where the sum total of the accounts proved exceed \$400.

c. How the amount is computed.

d. When the plaintiff is entitled to costs.

e. When the defendant is entitled to costs.

- f.* Where the accounts do not exceed \$400.
- g.* Recovery reduced below \$50 by the interposition of a counterclaim by the defendant.
- h.* Recovery reduced below \$50 by payments made after the commencement of the action.
- i.* Recovery increased above \$50 by the addition of interest which has accrued since the commencement of the action.
- j.* Miscellaneous cases where the recovery was less than \$50.

100. Generally.—The cases in which the successful party is entitled to costs upon recovering final judgment are designated in §§ 3228–3229 of the Code of Civil Procedure.

101. Action to recover real property.—The plaintiff is entitled to costs, of course, upon the rendering of a final judgment in his favor in “an action triable by a jury to recover real property, or an interest in real property; or in which a claim of title to real property arises upon the pleadings, or is certified to have come in question upon the trial.” Section 3228, subd. 1. It will be noticed that there is no limitation as to the value of the property or amount of the damages recovered to entitle the successful party to costs. In many cases there can be no damages assessed. If any are assessed they have no bearing upon the right to costs.¹

In an action to compel the determination of a claim to real property the defendant, if he puts in issue the question whether the plaintiff or those under whom he claims title has been in possession of the land in dispute for one year next preceding the commencement of the action, and succeeds upon that defense, is entitled, as a matter of right, to costs in the final judgment dismissing the complaint. Code Civ. Proc. § 1640.

If the defendant does not join issue with the plaintiff, no costs can be awarded to either party. Code Civ. Proc. § 1645.

The phrase “a claim of title to real property arises upon the pleading” does not mean that a claim of title arises from a mere assertion of title in the complaint, even in a case where, if the

¹ *Utter v. Gifford*, 25 How. Pr. 289.

title were disputed, it would be incumbent upon the plaintiff to prove it at the trial. A claim of title in the complaint is not a claim of title in the pleadings. The phrase has reference to a case where both parties in the pleadings claim the title, or when one claims it and the other disputes it.² The prevailing party is entitled to costs, as a matter of right, where the title of land comes in question, only in actions at law, not in actions in equity.³

a. When claim of title arises upon the pleadings. (1) *In general.*—It is sufficient to entitle the prevailing party to costs, if the title to real property arises on the pleadings,⁴ although upon the trial the opposite party admits the title of the successful party,⁵ because he was compelled to be ready to prove title and had incurred all the trouble and expense to prove that fact, and the admission only saves him the trouble of introducing proof that he has prepared. The claim of title arises on the pleadings where the plaintiff must show title in himself to recover, and the defendant makes a general denial⁶ or denies facts relating to title which the plaintiff must prove upon the trial in order to recover.⁷

(2) *Unnecessary allegations of title.*—The title to real estate does not arise upon the pleadings, when the pleader makes unnecessary allegations as to ownership of real estate, although his opponent makes a general denial of all the allegations in the pleadings.⁸

²*Lynk v. Weaver*, 128 N. Y. 171, 311, Affirmed in 21 N. Y. 466; *Mul-ler v. Bayard*, 15 Abb. Pr. 449; 28 N. E. 508.

³*Law v. McDonald*, 9 Hun. 23.

⁴*Niles v. Lindsley*, 8 How. Pr. 131, 1 Duer. 610; *Dempsey v. Hall*, 3 Jones & S. 201.

⁵*Dunkel v. Farley*, 1 How. Pr. 180; *Hubbell v. Rochester*, 8 Cow. 115.

⁶*Crowell v. Smith*, 35 Hun. 182; *Dunkel v. Farley*, 1 How. Pr. 180.

⁷*Rathbone v. McConnell*, 20 Barb.

Learn v. Currier, 15 Hun. 184, Af-firmed in 76 N. Y. 625.

⁸*Moody v. Steele*, 11 N. Y. Civ. Proc. Rep. 205. 3 N. Y. S. R. 269; *Learn v. Currier*, 15 Hun. 184, Af-firmed in 76 N. Y. 625; *Bloomingtondale v. Steubing*, 14 Misc. 549, 36 N. Y. Supp. 1074; *Rathbone v. McCon-nell*, 21 N. Y. 466.

This has been held in actions for assault and battery,⁹ for damages for the bite of a dog, and the answer alleges that the plaintiff was a trespasser;¹⁰ in an action for conversion because assessors had assessed real property to the plaintiff which did not belong to him, and the plaintiff's personal property had been sold to satisfy the tax thus levied;¹¹ and in actions by a landlord against his tenant for breach of covenant of the lease,¹² and for damages caused by the tenant.¹³

(3) *United with another cause of action.*—The plaintiff is not entitled to costs when he joins with a personal cause of action upon which he recovers less than \$50, a cause of action in which the title to real estate arises, and he is defeated on the latter.¹⁴ A claim of title to real property arises upon the pleadings only when such an issue is essentially or legitimately presented by the pleadings.¹⁵

b. Ejectment.—The successful party is entitled to costs in an action brought to recover real property, upon which the plaintiff claims that the defendant has built, where the defendant admits that the plaintiff is entitled to the property described in the complaint, but denies that his buildings encroached upon the land thus described.¹⁶

Both parties are entitled to costs where the action is brought to recover two parcels of land, and each party succeeds as to one parcel, as this is a case directly within the provision of § 3234 of the Code of Civil Procedure.¹⁷ Title to real estate comes in

⁹*Langdon v. Guy*, 91 N. Y. 660;
Welsh v. Fallissee, 75 Hun. 308, 56
N. Y. S. R. 777, 27 N. Y. Supp. 81.

¹⁰*Pierret v. Moller*, 3 E. D. Smith,
574.

¹¹*Bailey v. Daigler*, 50 Hun. 538,
20 N. Y. S. R. 549, 3 N. Y. Supp.
718.

¹²*Aaron v. Foster*, 11 N. Y. Civ.
Proc. Rep. 325, 3 N. Y. S. R. 270.

¹³*Cleveland v. Wilder*, 78 Hun. 591,
60 N. Y. S. R. 764, 29 N. Y. Supp.
209.

¹⁴*Burhans v. Tibbits*, 7 How. Pr.
74; *Shull v. Green*, 49 Barb. 311;

Hill v. Edie, 24 N. Y. Week. Dig.
124; *Shufelt v. Sweet*, 15 N. Y. Week.

Dig. 1; *Alexander v. Hard*, 42 How.
Pr. 131.

¹⁵*Bailey v. Daigler*, 50 Hun. 538,
20 N. Y. S. R. 549, 3 N. Y. Supp. 718.

¹⁶*Leprell v. Kleinschmidt*, 112 N.
Y. 364, 21 N. Y. S. R. 30, 19 N. E.
812.

¹⁷*Coon v. Diefendorf*, 2 How. Pr.
N. S. 389, 8 N. Y. Civ. Proc. Rep.

question in an action by the grantee against the grantor to recover back the amount of the purchase price, because he was evicted by paramount title.¹⁸

c. The question of title to real estate must be involved.—It is not sufficient that the question relate to real estate. The title must be in question.¹⁹ The title to real estate does not arise in an action brought on a land contract, for damages for failure to perform.²⁰

d. Lack of jurisdiction.—The plaintiff is not entitled to costs, although the court decides the question of title to real estate in his favor, if the court had no power to try the question.²¹

e. Action for dower.—In an action for dower the fees and expenses of the commissioners, or of the referee, including the expense of a survey, when it is made, must be taxed under the direction of the court, and the amount thereof must be paid to the plaintiff and allowed to her upon the taxation of her costs. Code Civ. Proc. § 1612. She is also entitled upon recovering judgment, to a full bill of costs.²² Where the case is sent to a referee for trial, his failure to award costs does not affect the plaintiff's right thereto,²³ because this is an action to recover real property, and is triable by a jury under § 968 of the Code of Civil Procedure.²⁴ It was decided in an action tried before the last nine chapters of the Code of Civil Procedure took effect, that the costs in such an action were in the discretion of the court.²⁵ These cases have been rendered obsolete by such enactment.

293; *Ackerman v. DeLude*, 20 N. Y. Week. Dig. 544; *Seymour v. Billings*, 12 Wend. 285; *Martin v. Martin*, 3 How. Pr. 203. ²²*Everson v. McMullen*, 45 Hun, 578, 10 N. Y. S. R. 627. Reversed on other grounds in 113 N. Y. 293, 22 N. Y. S. R. 787, 4 L. R. A. 118, 10

¹⁸*Mumford v. Withey*, 1 Wend. 279. Am. St. Rep. 445, 21 N. E. 52.

¹⁹*Collins v. Adams*, 15 N. Y. Civ. Proc. Rep. 384, 19 N. Y. S. R. 48, 4 N. Y. Supp. 217. ²³*Jones v. Emery*, 1 N. Y. Civ. Proc. Rep. 338.

²⁴*Jones v. Emery*, 1 N. Y. Civ. Proc. Rep. 338; *Vadney v. Thompson*, 44 Hun. 1, 6 N. Y. S. R. 395; 235.

²⁵*Wilkins v. Williams*, 15 N. Y. Civ. Proc. Rep. 168, 17 N. Y. S. R. 238, 3 N. Y. Supp. 897. *Kinne v. Kinne*, 2 Thomp. & C. 393. ²⁶*Aikman v. Harsell*, 31 Hun, 634,

f. Trespass.—The title to real estate arises upon the pleadings when an action is brought for trespass and the defendant denies the plaintiff's title, whether by general denial,²⁶ or specifically,—as, where the defendant sets up adverse possession, or prescriptive right in the land in question, as, a right to overflow the plaintiff's land;²⁷ or the defendant seeks to justify the alleged trespass by proof of a right of common of estovers as tenant,²⁸ or a right of way, either by grant or prescription.²⁹ It also arises where the plaintiff must prove title in order to maintain his action,—as, where the land is wild and uncultivated and the plaintiff must prove constructive possession,³⁰ or where the payment of rent and the right of possession is in dispute.³¹ The question of title to real estate does not arise where the question involved is whether the alleged trespass was committed within the admitted bounds of the plaintiff's land,³² or where the question involved was whether the plaintiff had suffered any damage from the alleged trespass,³³ or where the plaintiff is not compelled to prove title to establish constructive possession.³⁴

The title to real estate arises in an action for damages to the freehold, but does not arise in an action for injury to possession.³⁵ It does not arise in an action for a nuisance, where the damage is not a permanent injury, but only to the right of possession. In an action for damages to the freehold, the question would only arise in case the defendant denied the plaintiff's title.³⁶

5 N. Y. Civ. Proc. Rep. 93; *Schierloh v. Schierloh*, 14 Hun, 572.

²⁶*Horton v. Jordan*, 32 N. Y. S. R. 920, 11 N. Y. Supp. 2.

²⁷*Tunnicliff v. Lawry*, 3 Cow. 382; *Eustace v. Tuthill*, 2 Johns. 185.

²⁸*Radley v. Brice*, 6 Wend. 539.

²⁹*Heaton v. Ferris*, 1 Johns. 146.

³⁰*Hubbell v. Rochester*, 8 Cow. 115.

³¹*Powers v. Conroy*, 47 How. Pr. 84; *Dempsey v. Hall*, 3 Jones & S. 201.

³²*Heintz v. Dellinger*, 28 How. Pr. 39.

³³*Dunster v. Kelly*, 110 N. Y. 558, 18 N. Y. S. R. 548, 18 N. E. 361.

³⁴*Brown v. Majors*, 7 Wend. 495.

³⁵*Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540, 23 N. E. 1054;

Kelly v. Manhattan Beach R. Co. 81 N. Y. 233; *Bruen v. Manhattan R. Co.* 20 N. Y. Civ. Proc. Rep. 127, 39

N. Y. S. R. 86, 14 N. Y. Supp. 788.

³⁶*Quinn v. Winter*, 22 Abb. N. C.

g. Plea of license.—A claim of license does not necessarily involve the question of title. If the license is alleged to be from the plaintiff, it does not arise.³⁷ If the validity of the license from another is in question, it does not arise.³⁸ It does not arise although the right of the licensor to give the license is denied by the reply.³⁹

The question does not arise where the defendant justifies, by means of a parol license, the damage to the plaintiff, caused by overflowing the plaintiff's land;⁴⁰ nor where he justifies by a parol license the entry upon plaintiff's land for the purpose of opening a drain,⁴¹ or cutting and carrying away grass,⁴² or where he pleads a like justification for a trespass upon uninclosed land covered with water,⁴³ or for damages for a diversion of water from a stream.⁴⁴ But the title to real estate does arise in an action against a municipal corporation brought to recover damages for causing a sewer to overflow the land of the plaintiff, and the answer is that the alleged sewer is a water-course, and defendant claims a right by prescription to maintain it.⁴⁵

h. Plea that the land is a highway.—The defendant is entitled to costs where he admits title in the plaintiff, and the trespass by himself, the damages for which are less than \$50, but justifies

462. 25 N. Y. S. R. 851, 4 N. Y. Supp. 865.

³⁷*Mechl v. Schwieckart*, 67 Barb. 599, 3 N. Y. Week. Dig. 405; *Powers v. Gross*, 6 Hun. 234; *Seaman v. Glegner*, 3 Hun. 119; *New v. Anthony*, 4 Hun. 53; *O'Reilly v. Davies*, 4 Sandf. 722; *Powell v. Rust*, 8 Barb. 567, N. Y. Code Rep. N. S. 172; *Launitz v. Barnum*, 4 Sandf. 637; *Craven v. Price*, 37 How. Pr. 15, 53 Barb. 442; *Turner v. VanRiper*, 43 How. Pr. 33; *Muller v. Bayard*, 15 Abb. Pr. 499; *Dunster v. Kelly*, 110 N. Y. 558, 18 N. E. 361; *Dolittle v. Eddy*, 7 Barb. 74; *Utter v. Gifford*, 25 How. Pr. 289.

³⁸*Launitz v. Barnum*, 4 Sandf. 637. But see *Mechl v. Schwieckart*, 67 Barb. 599, 3 N. Y. Week. Dig. 405.

³⁹*Mechl v. Schwieckart*, 67 Barb. 599, 3 N. Y. Week. Dig. 405.

⁴⁰*Chandler v. Duane*, 10 Wend. 563, 23 Am. Dec. 578; *Otis v. Hall*, 3 Johns. 450.

⁴¹*People ex rel. Fryer v. New York Common Pleas*, 18 Wend. 579.

⁴²*Craven v. Price*, 53 Barb. 442, 37 How. Pr. 15.

⁴³*Wickham v. Seely*, 18 Wend. 649.

⁴⁴*Rathbone v. McConnell*, 21 N. Y. 466.

⁴⁵*Green v. Canandaigua*, 30 Hun. 306.

under a law which provided for the laying out of a highway, which is subsequently declared unconstitutional;⁴⁶ or under proceedings instituted to lay out a highway, which have been discontinued;⁴⁷ or under a plea that the land where the alleged trespass occurred was a highway, and succeeds upon that issue.⁴⁸ But a plea in an action for trespass, of a right reserved between grantor and grantee to enter and carry away growing vines and shrubs, raises the question of title.⁴⁹

It was held under the Revised Statutes that where the damages in an action for trespass are trebled by the court, so that they amount to more than \$50, the plaintiff is entitled to costs.⁵⁰ These decisions have been rendered obsolete by a change in the statute.⁵¹

i. *Actions in relation to easements.*—The question of title to real estate comes in issue when it relates to an easement of one of the parties over land belonging to the state, or the right of the state to an easement over the real estate of the plaintiff,⁵² or for damages to an easement, where the defendant denies any knowledge of ownership.⁵³ The question of title does not arise in an action for damages resulting from the obstruction of the approach to the plaintiff's upland from a river.⁵⁴ But it arises in an action to recover damages caused by the construction and maintenance of an elevated railroad.⁵⁵

j. *Actions between landlord and tenant.*—The question of title

⁴⁶*Dexter v. Alfred*, 74 Hun, 259, 56 N. Y. S. R. 264, 26 N. Y. Supp. 592.

⁴⁷*Guernsey v. Davidson*, 7 Alb. L. J. 204.

⁴⁸*Heath v. Barmour*, 35 How. Pr. 1, 50 Barb. 444, Affirmed in 50 N. Y. 302.

⁴⁹*Powell v. Rust*, 8 Barb. 567, N. Y. Code Rep. N. S. 172.

⁵⁰*Keiny v. Ingraham*, 66 Barb. 250; *Jermain v. Booth*, 1 Denio, 639.

⁵¹*Lynch v. Weaver*, 128 N. Y. 171, 28 N. E. 508.

⁵²*Slingerland v. International Con-*

tracting Co., 43 App. Div. 215, 60 N. Y. Supp. 12.

⁵³*Bruen v. Manhattan R. Co.* 20 N. Y. Civ. Proc. Rep. 127, 39 N. Y. S. R. 86, 14 N. Y. Supp. 788; *Jones v. Metropolitan Elev. R. Co.* 27 Jones & S. 437, 14 N. Y. Supp. 632.

⁵⁴*Rumsey v. New York & N. E. R. Co.* 50 N. Y. S. R. 253, 21 N. Y. Supp. 193.

⁵⁵*Powers v. Manhattan R. Co.* 20 N. Y. Civ. Proc. Rep. 78, 14 N. Y. Supp. 130.

arises in an action by the landlord against a tenant for damages to real estate, where the answer is a general denial;⁵⁶ or in an action for mesne profits, where the answer is a general denial;⁵⁷ or in an action for damages for trespass in removing furniture, where the question is whether the plaintiff is a tenant of the defendant or a trespasser;⁵⁸ or in an action for damages for the destruction of furniture, where the plaintiff alleged that he was lawfully in possession of a house, and the defendant alleged that the title was in a third person;⁵⁹ or in an action for trespass, where the defendant claimed as tenant.⁶⁰

k. Title to real estate proven as a matter of evidence.—A party in an action where his title is not denied cannot, by proving his title, in order to make his case more sure, bring the question of title of real estate in question, and thus be entitled to costs upon a recovery of less than \$50.⁶¹

The defendant, by claiming that title to real estate comes in question, and forcing the plaintiff to prove his title, is estopped from afterwards claiming that title to real estate does not come in question.⁶²

k. Title to real estate proven as a matter of evidence.—A menced in a justice's court, where a plea of title has been interposed under § 2951 of the Code of Civil Procedure, the costs in the new action, brought as provided by §§ 2952 *et seq.*, are determined as though the action had been originally brought in the supreme court. The party succeeding on the question of title is entitled to costs. The defendant has the burden of proving, in the first instance, that the title to real property is involved. In case of his failure to prove this, he must pay costs to the plaintiff to compensate him for the added expense of trying his

⁵⁶*Dempsey v. Hall*, 3 Jones & S. N. Y. S. R. 620, 23 N. Y. Supp. 402. 201.

⁶⁰*Boyle v. Lawton*, 3 How. Pr. N.

⁵⁷*Broadway v. Scott*, 31 Hun, 378; S. 444.

⁵⁸*Ainslie v. New York*, 1 Barb. 168.

⁶¹*Burnet v. Kelly*, 10 How. Pr. 406.

⁵⁹*Powers v. Conroy*, 47 How. Pr. 84.

⁶²*Foster v. Romer*, 15 N. Y. Week. Dig. 487.

⁶⁰*Farrell v. Hill*, 69 Hun, 455, 52

case in a court of record. The defendant must also prove, not only that the title to real estate is in question, but he must succeed upon his claim of title. Unless he succeeds in both respects, he has raised a question upon which he has been beaten, when the plaintiff had brought an action to decide another question, in a court where the expense would be small, and has been compelled to litigate not only that question, but the question of title in a court of record.

The plaintiff is entitled to costs, though he recovers less than \$50, when he succeeds as to any part of the title, if the defendant has justified his acts thereunder.⁶³

To entitle the defendant to costs, although he obtains final judgment in his favor, he must obtain a certificate that the title to real property came in question on the trial.⁶⁴ In the event of his failure to obtain such a certificate, the plaintiff can tax his costs.⁶⁵

The defendant is entitled to costs where the plaintiff, after commencing an action in the supreme court, fails to establish his title, which it is necessary for him to do in order to recover,⁶⁶ or makes default upon the trial,⁶⁷ or does not attempt to prove the trespass alleged,⁶⁸ or has unnecessarily alleged title.⁶⁹ The defendant is also entitled to costs when he succeeds in the supreme court upon the question of title,⁷⁰ or succeeds upon the question of title to that portion of land in dispute, and the plaintiff recovers less than \$50 damages for trespass upon that portion of the land not in dispute.⁷¹

⁶³*Heath v. Barmour*, 53 Barb. 444, 35 How. Pr. 1; *Burhans v. Tibbits*, 7 How. Pr. 74; *Hall v. Hodskins*, 30 How. Pr. 15; *Randals v. Thonton*, 4 Alb. L. J. 76; *Locklin v. Casler*, 50 How. Pr. 43.

⁶⁴Code Civ. Proc. § 3235.

⁶⁵*Taylor v. Wright*, 36 App. Div. 568, 55 N. Y. Supp. 761.

⁶⁶*Saunders v. Goldthrite*, 41 Hun, 242.

⁶⁷*Gates v. Canfield*, 28 Hun, 12, 64 How. Pr. 81, 2 N. Y. Civ. Proc. Rep. (McCarty) 255.

⁶⁸*Falkel v. Moore*, 32 Hun, 293.

⁶⁹*Squires v. Seward*, 16 How. Pr. 448.

⁷⁰*Morss v. Salisbury*, 48 N. Y. 636.

⁷¹*Harding v. Ellston*, 19 N. Y. Civ. Proc. Rep. 252, 13 N. Y. Supp. 549.

m. Power of the justice's court before removal of the action.

—A justice of the peace has jurisdiction of an action in which a plea of title has been interposed, until the undertaking provided by law is delivered to him. There is no provision for a justification of sureties before him, but he doubtless can disapprove of the sureties offered, if he notes in his record his reason for such disapproval, and thus retain jurisdiction of the case, in which case he should return the undertaking. If the undertaking is not delivered, the justice retains jurisdiction, but upon the trial the defendant cannot introduce any evidence to sustain his plea of title. Although upon a new trial in the county court upon appeal from the judgment rendered by the justice, the county court, having a right to try the question of title to real estate, must hear such evidence as is presented to it upon the questions involved, although the defendant may have waived some of his rights in the trial before the justice.⁷²

Under § 2958 of the Code of Civil Procedure, where a plea of title is interposed to only one of two or more causes of action, and there are other causes of action to which that plea is not interposed, the justice must try those to which no plea of title is interposed. Under proper practice there cannot arise a case where the defendant could succeed in the supreme court upon a question of title, and the plaintiff still have an affirmative judgment.

n. Action to abate a nuisance.—Costs are not allowed as a matter of right in an action to abate a nuisance,⁷³ but rest in the discretion of the court. If the title to the real estate is disputed, then the successful party is entitled to costs, as a matter of right. Where a plaintiff founds his right to recover for a nuisance upon the fact that he is the owner and possessor of cer-

⁷²*Gould v. Patterson*, 63 Hun. 575. ⁷³*Le Roy v. Browne*, 54 Hun. 584. 28 Abb. N. C. 385. 22 N. Y. Civ. Proc. 18. N. Y. Civ. Proc. Rep. 125. 28 N. Rep. 230. 45 N. Y. S. R. 85, 18 N. Y. Y. S. R. 210, 8 N. Y. Supp. 82. Supp. 332.

tain real estate, and the defendant denies such possession and ownership, the title to real estate comes in question.⁷⁴

o. Action for trespass and assault and battery.—The plaintiff upon a recovery of less than \$50 is not entitled to full costs in an action for assault and battery, although he alleges that he owned certain premises and the defendant entered thereon and committed an assault upon him, and the defendant alleges that another owned the premises and the plaintiff wrongfully entered and committed an assault upon the owner. It is an action for simple assault, and no injury to the freehold is alleged. The allegations of ownership are mere matters of description, and not facts upon which the right of either party depends.⁷⁵ But if in an action for assault and battery the judge certifies that the title to real estate comes in question, the plaintiff is entitled to a full bill of costs, although he recovers less than \$50.⁷⁶

p. Certificate of judge that question of title arose on the trial.—Although a claim of title does not arise upon the pleading, yet the successful party is entitled to costs, whatever the amount of the verdict, if a certificate of the trial judge or referee is given, showing that a question of title arose upon the trial. Such certificate is conclusive upon the taxing officer.⁷⁷ Under such a certificate the plaintiff is entitled to costs, although he recovers less than \$50, where he fails in proving title, but only shows possession.⁷⁸ If the certificate is improperly granted, the remedy of the party aggrieved is by motion at special term, not by appeal.⁷⁹ The granting of such a certificate is such an interme-

⁷⁴*Quinn v. Winter*, 22 Abb. N. C. Civ. Proc. Rep. 138; *Lillis v. O'Connor*, 8 Hun, 280; *Dinehart v. Wells*, 462. 25 N. Y. S. R. 851, 4 N. Y. Supp. 2 Barb. 432. Affirmed by Court of 865.

⁷⁵*Welsh v. Fallihee*, 75 Hun, 308, Appeals, July 2, 1850, no opinion 56 N. Y. S. R. 777, 27 N. Y. Supp. 81. and report; *New York v. Hillsburgh*,

⁷⁶*Lillis v. O'Connor*, 49 How. Pr. 2 N. Y. Code Rep. 152. 497, Affirmed in 8 Hun, 280.

⁷⁷*Cooley v. Cummings*, 24 Jones & 920, 11 N. Y. Supp. 2. S. 521, 17 N. Y. Civ. Proc. Rep. 145, ⁷⁸*Cooley v. Cummings*, 24 Jones & 24 N. Y. S. R. 172, 4 N. Y. Supp. S. 521, 17 N. Y. Civ. Proc. Rep. 145, 530; *Davies v. Williams*, 13 N. Y. 24 N. Y. S. R. 172, 4 N. Y. Supp.

ciate order that when specified in the notice of appeal, it will be brought up for review by an appeal from the final judgment.⁸⁰ On a motion to vacate the certificate, the court can review the grounds upon which the certificate was granted.⁸¹

Upon a motion for that purpose a judge may correct an order made by him, giving costs to the wrong party. He has no power to order costs to a party when the statute gives them otherwise.⁸²

No certificate is needed to enable the plaintiff to tax a full bill of costs, whatever may be the size of the verdict in his favor, where the title to real estate comes in question upon the pleadings.⁸³

102. Action to recover a chattel. *a. In general.*—In an action to recover several articles of personal property, where the complaint contains only one cause of action and the plaintiff recovers a portion of the property and the defendant the balance, the plaintiff alone is entitled to costs.⁸⁴ The cases that held that where the defendant succeeded as to a part of the goods, and the plaintiff as to the rest, both parties were entitled to costs, have been overruled, and it has been held that cases under the Revised Statutes are not applicable to cases arising under the Code of Civil Procedure.⁸⁵

This rule can work no injustice to the defendant, as, by an offer of judgment, he can throw upon the plaintiff the responsibility for costs incurred in prosecuting an unsuccessful litigation

530; *Davies v. Williams*, 13 N. Y. Civ. Proc. Rep. 138; *Barney v. Keith*, 6 Wend. 555; *Mumford v. Withey*, 1 Wend. 279; *Burhans v. Tibbits*, 7 How. Pr. 75; *Niles v. Lindsley*, 1 Exr. 610; *Utter v. Gifford*, 25 How. Pr. 297. ⁸⁴*Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170, 17 N. Y. Civ. Proc. Rep. 238, 24 N. Y. S. R. 545; *Mertens v. Fitzwater*, 53 Hun. 597; *Niles v. Lindsley*, 1 Exr. 610; *Utter v. Gifford*, 25 How. Pr. 297.

⁸⁰*Cooley v. Cummings*, 24 Jones & S. 521, 17 N. Y. Civ. Proc. Rep. 145, 24 N. Y. S. R. 172, 4 N. Y. Supp. 530. ⁸¹*Barney v. Keith*, 6 Wend. 555. ⁸²*Boardway v. Scott*, 31 Hun. 378. ⁸³*Kelly v. New York & M. B. R. Co.* 1 Month. L. Bull. 43. Affirmed in 19 Hun. 363.

⁸⁴*Barney v. Keith*, 6 Wend. 555. ⁸⁵*Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170, 17 N. Y. Civ. Proc. Rep. 238, 24 N. Y. S. R. 545.

as to any article of property described in the complaint. The same rule applies where an offer of judgment for the return of a portion of the goods in question, together with a certain sum for damages for detention, is accepted, and judgment is entered thereon. Plaintiff's costs are limited by the amount of the value of the chattel, as fixed in the offer of judgment plus the amount of damages, if that sum is less than \$50.⁸⁶ In an action to recover several articles of personal property where the complaint sets forth two or more causes of action upon which issues of fact are joined, if the plaintiff succeeds as to one or more, and defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue, in which case the plaintiff only is entitled to costs.⁸⁷

b. The value of the chattels as fixed by the verdict.—The amount of costs recoverable by the plaintiff in an action in replevin cannot exceed the value of the chattel as fixed by the trial court, together with the damages, where such sum is less than \$50.⁸⁸ If such sum is \$50 or more, the plaintiff is entitled to a full bill of costs, notwithstanding the defendant recovers property exceeding that sum.⁸⁹ The plaintiff is not entitled to costs where the verdict simply awards the chattels to the plaintiff, without fixing the value thereof.⁹⁰ If the action is tried upon an appeal from a judgment of a justice's court, the plaintiff cannot resort to the judgment of the justice's court to aid him in fixing the value of the chattels.⁹¹

⁸⁶*Hausauer v. Machawiecz*, 54 App. Div. 23, 66 N. Y. Supp. 340.

⁸⁸*Stoddard v. Clarke*, 9 Abb. Pr. N. S. 310.

⁸⁷Code Civ. Proc. § 3234; Code Civ. Proc. § 3228, subdiv. 2; *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170, 17 N. Y. Civ. Proc. Rep. 238, 24 N. Y. S. R. 545.

⁹⁰*Wolff v. Moses*, 26 Misc. 500, 6 N. Y. Anno. Cas. 163, 57 N. Y. Supp. 696; *Herman v. Girvin*, 8 App. Div. 418, 40 N. Y. Supp. 845.

⁸⁹*Wilkins v. Williams*, 15 N. Y. Civ. Proc. Rep. 168, 17 N. Y. S. R. 238, 3 N. Y. Supp. 897; Code Civ. Proc. § 3228, subdiv. 2.

⁹¹*Lockwood v. Waldorf*, 91 Hun, 281, 70 N. Y. S. R. 855, 36 N. Y. Supp. 199.

The plaintiff cannot show by affidavit the value of the goods recovered by him, where he has failed to do so on the trial.⁹² It has been held that where the plaintiff has the goods in his possession, and he recovers a judgment that he is entitled to retain them, he is entitled to tax a full bill of costs, although the value of the goods was not fixed, and no damages were recovered for the detention of the goods.⁹³ But this ruling has been criticised, and, doubtless, would not now be followed.⁹⁴

The plaintiff is not entitled to costs when he recovers a judgment for money only, of less than \$50 in an action where the complaint could be either for conversion or replevin,⁹⁵ because he accepted a judgment which is consistent with the action for conversion, and he could have obtained the same judgment in an inferior court.⁹⁶

c. Action by finder to recover lost property from depositary.—Where a finder of lost property gives it to a third party to be delivered to the rightful owner, who never claims it, he is entitled to costs in an action to recover it from the depositary, although after such verdict the rightful owner claims the property and the finder is enjoined from receiving the money or entering judgment upon the verdict recovered by him.⁹⁷

103. Actions of which a justice of the peace has not jurisdiction. *a. In general.*—The plaintiff is entitled to costs upon the recovery of a verdict in an action of which a justice of the peace has not jurisdiction, as enumerated in § 2863 of the Code of Civil Procedure. But in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal con-

⁹²*Rapid Safety Filter Co. v. Wyckoff*, 20 Misc. 429, 45 N. Y. Supp. 1028.

⁹³*Claflin v. Davidson*, 21 Jones & S. 122, 8 N. Y. Civ. Proc. Rep. 46.

⁹⁴*Herman v. Girrin*, 8 App. Div. 418, 40 N. Y. Supp. 845; *Rapid Safety Filter Co. v. Wyckoff*, 20 Misc. 429, 45 N. Y. Supp. 1028.

⁹⁵*McLain v. Mathushek Piano Mfg. Co.* 54 App. Div. 126, 8 N. Y. Anno. Cas. 237, 66 N. Y. Supp. 397.

⁹⁶*McLain v. Mathushek Piano Mfg. Co.* 54 App. Div. 126, 8 N. Y. Anno. Cas. 237, 66 N. Y. Supp. 397.

⁹⁷*New York & H. R. Co. v. Haws*, 56 N. Y. 175.

versation, seduction, or malicious prosecution, or a fine or penalty in which the people of the state are a party, the plaintiff is entitled to costs only to the amount of the verdict, unless he recovers \$50 or more.⁹⁸

b. Assault and battery.—Where the plaintiff brings an action for damages for an assault and battery against two defendants, who appeared by the same attorney, and recovers a verdict of \$25 against one defendant, and the other has a verdict of no cause of action, the successful defendant is entitled to a full bill of costs, and the plaintiff is entitled to \$25 costs against the other defendant.⁹⁹

The plaintiff can only tax \$10 in all for his costs and disbursements in an action for assault and battery, where he was nonsuited on the first trial, and the general term reversed this, with costs to abide the event, and on the second trial he recovers a verdict of \$10.¹⁰⁰ A law which gives jurisdiction to a local court in actions for assault and battery, and provides that in actions in the supreme court for such causes within the territorial jurisdiction of the local court, costs cannot exceed the recovery, will not bind the plaintiff, where the case was originally brought outside the jurisdiction of the local court, but was removed within such jurisdiction by the defendant.¹⁰¹

When the plaintiff joins with an action for assault and battery another cause of action in which the defendant is entitled to costs, unless the plaintiff recovers a verdict of \$50, and the jury renders a general verdict for less than \$50, the defendant is entitled to costs;¹⁰² or, at most, the defendant is entitled to a full bill of costs, and the plaintiff to 6 cents costs.¹⁰³

c. Alienation of affections.—The plaintiff in an action for

⁹⁸ Code Civ. Proc. § 3228, subdiv. 3.

¹⁰¹ *Sleight v. Haneox*, 4 Abb. Pr.

⁹⁹ *Stone v. Duffy*, 3 Sandf. 761, N. 245.

Y. Code Rep. N. S. 129.

¹⁰² *Chapin v. Cole*, 38 How. Pr. 481.

¹⁰⁰ *Snyder v. Collins*, 12 Hun, 383.

¹⁰³ *Shorke v. Charles*, 18 Wend. 616.

alienation of affections is entitled to the same amount of costs as damages, where he recovers less than \$50.¹⁰⁴

d. Malicious prosecution.—An action for malicious prosecution is among those enumerated, where the plaintiff's costs cannot exceed the amount of the damages, if the damages are less than \$50.¹⁰⁵

e. Action for causing death.—In an action brought by an executor or administrator for damages for causing the death of his decedent, as provided in § 1902 of the Code of Civil Procedure, the plaintiff is entitled to a full bill of costs, if he recovers any amount.¹⁰⁶

104. Other actions where the recovery is less than \$50. *a. In general.*—The laws seeks to discourage the bringing of petty actions in courts of record. Therefore, it not only refuses costs to a plaintiff in an action which he could have brought in an inferior court, if he recovers less than \$50, but, on the other hand, gives costs to the defendant in such cases.¹⁰⁷ But a plaintiff in an action upon a Lloyd insurance policy is entitled to a full bill of costs, although the recovery against the several underwriters is less than \$50, provided the aggregate recovery on the policy is over \$50.¹⁰⁸

b. Actions where the sum total of the accounts proved exceed \$400.—By subd. 4 of § 2863 of the Code of Civil Procedure, a justice of the peace has not jurisdiction of an action "where, in a matter of account, the sum total of the accounts proved to the satisfaction of the justice exceeds \$400."

The adjudication of a justice of the peace that the sum of the

¹⁰⁴*Wilson v. McGregor*, 20 N. Y. Rep. 202, 37 N. Y. S. R. 556, 13 N. Y. Civ. Proc. Rep. 36, 207, 34 N. Y. Supp. 653; *O'Connor v. Union R. Co.* S. R. 775, 12 N. Y. Supp. 39. 33 Misc. 728, 68 N. Y. Supp. 1056;

¹⁰⁵*Marsullo v. Billotto*, 55 How. Pr. 375; *Peet v. Worth*, 1 Bosw. 653; *N. C.* 291, 22 N. Y. Supp. 171. *Belding v. Conklin*, 2 N. Y. Co. Rep. 112, 4 How. Pr. 196. ¹⁰⁷Code Civ. Proc. §§ 3228, 3229, subdiv. 4.

¹⁰⁸*Gorton v. United States & B.* ¹⁰⁸*Huff v. Jewett*, 20 Misc. 35, 44 *Mail S. S. Co.* 20 N. Y. Civ. Proc. N. Y. Supp. 311.

accounts exceeds \$400 is conclusive upon the parties, and the plaintiff is entitled to full costs in the new action brought in the supreme court, if he recovers any amount.¹⁰⁹

It is not necessary, in order to entitle the plaintiff to costs, where the total of the accounts on both sides exceed \$400, and he recovers a verdict of less than \$50, that he first bring his action in the justice's court and discontinue it there.¹¹⁰ He may bring his action in the first instance in a court of record, but in such a case the burden is on him to show that the amount of claims proved exceeded the sum of \$400. It is not sufficient to show that the sum total of the accounts claimed or contested exceeds that sum.¹¹¹ When the action is tried before a court or referee, the question is determined by the facts found,¹¹² and when tried before a jury, by the sum total of the accounts shown to have been proved to their satisfaction.¹¹³ The fact that the court submits to the jury the question of fact whether items, the sum of which exceed \$400 have been proven to their satisfaction does not meet the requirement of the statute.¹¹⁴ But where the jury specifically find that the sum total of the accounts proved to their satisfaction exceed \$400, that is sufficient. It is very doubtful whether anything less is sufficient. If they find for the plaintiff in various amounts, and for the defendant in various amounts, and by the directions of the court render a verdict for the plaintiff for the balance, the requirements of the statute

¹⁰⁹*Bailey v. Stone*, 41 How. Pr. *Youker v. Johnson*, 62 App. Div. 584, 246; *Glackin v. Zeller*, 52 Barb. 147; 71 N. Y. Supp. 178.

Kirk v. Blashfield, 6 Thomp & C. ¹¹²*Kemp v. Union Gas & Oil Stove Co.* 22 N. Y. Civ. Proc. Rep. 190, 46 509; *Bradner v. Howard*, 75 N. Y. 417, Affirming 14 Hun, 420, 7 N. Y. N. Y. S. R. 67, 19 N. Y. Supp. 959; *Week*, Dig. 57. *Glackin v. Zeller*, 52 Barb. 153; *Gil-*

¹¹⁶*Glackin v. Zeller*, 52 Barb. 153; *liland v. Campbell*, 18 How. Pr. 177. *Tompkins v. Greene*, 21 Hun, 257; ¹¹³*Fuller v. Conde*, 47 N. Y. 89; *Youker v. Johnson*, 62 App. Div. 584, *Sherry v. Cary*, 111 N. Y. 517, 19 71 N. Y. Supp. 178. N. E. 87; *Youker v. Johnson*, 62

¹¹¹*Tompkins v. Greene*, 21 Hun, App. Div. 584, 71 N. Y. Supp. 178. 257, Affirmed in 82 N. Y. 619; *Sherry* ¹¹⁴*Youker v. Johnson*, 62 App. Div. *v. Cary*, 111 N. Y. 517, 19 N. E. 87; 584, 71 N. Y. Supp. 178.

are fulfilled.¹¹⁵ Where the amount of the plaintiff's claim is admitted, and is in excess of \$400, and the amount of the defendant's claim is decided to be in excess of \$400, the statutory requirement is fulfilled.¹¹⁶

c. How the amount is computed.—The amount involved is not the sum of the entire amount of both sides of an account, but the balance due after deducting payments made thereon.¹¹⁷ Payments made on account are no part of the claim.¹¹⁸ Where a purchaser retained \$500 of the purchase price of a house, with which to complete it, the amount involved in an action by the seller is the amount remaining unexpended.¹¹⁹

In an action for services, where the defendant sets up a counterclaim of money loaned, the amount of the plaintiff's claim must be reduced by payments made thereon, and the counterclaim must be reduced by payments made thereon, and other charges of the plaintiff against the defendant. Where the sum of these claims as thus reduced does not equal \$400, and the plaintiff recovers less than \$50, the defendant is entitled to costs.¹²⁰

The word "accounts" in § 2863 of the Code of Civil Procedure means demands, and is not restricted to running accounts.¹²¹ Cases under the Revised Statutes,¹²² or under the Code of 1848¹²³, are not now applicable, as the law under which they

¹¹⁵*Sherry v. Cary*, 111 N. Y. 517, 19 N. E. 87.

¹¹⁶*Stilwell v. Staples*, 5 Duer, 691, 3 Abb. Pr. 365.

¹¹⁷*Walp v. Boyd*, 19 N. Y. S. R. 111, 2 N. Y. Supp. 735; *Tompkins v. Greene*, 21 Hun, 257; *Nauman v. Braun*, 20 N. Y. Civ. Proc. Rep. 77, 14 N. Y. Supp. 139; *Crim v. Cronkhite*, 15 How. Pr. 250; *Burdick v. Hale*, 13 Abb. N. C. 60, 4 N. Y. Civ. Proc. Rep. 311.

¹¹⁸*Steele v. MacDonald*, 4 N. Y. Civ. Proc. Rep. 227; *Mander v. Bell*, 4 N. Y. Week. Dig. 519.

¹¹⁹*Brady v. Durbrow*, 2 E. D. Smith, 78.

¹²⁰*Steele v. MacDonald*, 4 N. Y. Civ. Proc. Rep. 227.

¹²¹*Underhill v. Rushmore*, 51 App. Div. 204, 64 N. Y. Supp. 1015. *Contra*, *Crane v. Holcomb*, 2 Hilt. 269, Affirmed in 8 Abb. Pr. 35, note; *Lund v. Broadhead*, 41 How. Pr. 146.

¹²²*Spring Valley Shot & Lead Co. v. Jackson*, 2 Sandf. 622.

¹²³*Kalt v. Lignot*, 3 Abb. Pr. 33, Affirmed in 3 Abb. Pr. 190.

were decided has been materially modified in our present Code.¹²⁴ Only the amounts in dispute will be considered in making up the sum in dispute. Claims on either side that are conceded will be disregarded.¹²⁵

The plaintiff cannot entitle himself to costs when he recovers less than \$50, by alleging that his damages exceed \$400. It is the amount proved, not the amount claimed, that determines the question of costs.¹²⁶

d. When the plaintiff is entitled to costs.—The plaintiff is entitled to costs if he recovers a verdict for any amount, where the total of accounts on both sides exceed \$400.¹²⁷ In an action on a note for \$186, the defendant alleged that it had been given in settlement of a partnership account, that there had been a mistake in the computation, and that in reality the plaintiff owed the defendant \$100. The referee examined accounts in excess of \$2,000, and gave the plaintiff judgment for \$26.12. It was held that the plaintiff was entitled to costs.¹²⁸

e. When the defendant is entitled to costs.—If the defendant obtains a verdict for any amount, he is entitled to costs;¹²⁹ or if it is determined that the accounts do not exceed \$400 and the plaintiff recovers less than \$50.¹³⁰

¹²⁴*Ury v. Wilde*, 15 N. Y. Civ. Proc. Rep. 451, 19 N. Y. S. R. 674, 3 N. Y. Supp. 791. *Silk & Woolen Mills v. Eull*, 6 Abb. Pr. N. S. 319, 37 How. Pr. 299, 1 Sweeny, 359; *Loblache v. Kirkpatrick*, 8 N. Y. Civ. Proc. Rep. 340, 3

¹²⁵*Hoodless v. Brundage*, 8 How. Pr. 263; *Matteson v. Bloomfield*, 10 Wend. 556. *rnick*, 8 N. Y. Civ. Proc. Rep. 340, 3 How. Pr. N. S. 61; *Lund v. Broadhead*, 41 How. Pr. 146; *Griffen v.*

¹²⁶*Seaman v. Glegner* 3 Hum. 119, 5 Thomp. & C. 273; *Brady v. Smith*, 1 N. Y. City Ct. Rep. 175; *Tompkins v. Greene*, 21 Hum. 257; *Glackin v. Zeller*, 52 Barb. 147; *Lultgor v. Walters*, 64 Barb. 419; *Fuller v. Conde*, 47 N. Y. 89; *Blank v. Westcott*, 7 Abb. Pr. N. S. 225; *Pinder v. Stoot-hoff*, 7 Abb. Pr. N. S. 433; *Alexander v. Hard*, 42 How. Pr. 131. *Brown*, 35 How. Pr. 372, 53 Barb. 428; *Friedman v. Eisenberg*, 24 N. Y. S. R. 298, 4 N. Y. Supp. 551; *Stillwell v. Staples*, 3 Abb. Pr. 365, 5 Duer, 691.

¹²⁷*Gilliland v. Campbell*, 18 How. Pr. 177.

¹²⁸*Smith v. Bryant*, 29 Misc. 564, 61 N. Y. Supp. 943; *Ury v. Wilde*, 15 N. Y. Civ. Proc. Rep. 451, 19 N. Y. S. R. 674, 3 N. Y. Supp. 791.

¹²⁹*Sherry v. Cary*, 111 N. Y. 514, 19 N. E. 87; *Hayes v. O'Reilly*, 8 N. Y. Civ. Proc. Rep. 347, note; *Boston Co.* 22 N. Y. Civ. Proc. Rep. 190, 46

f. Where the accounts do not exceed \$400.—Where the accounts do not exceed \$400, the plaintiff must recover \$50 to be entitled to costs; otherwise the defendant will be entitled to costs.¹³¹ Nor can the plaintiff tax his disbursements, as the right to tax them depends upon his right to tax the general costs in the action.¹³² If the plaintiff in an action in which the complaint demands judgment for a sum of money only, whether it be an action at law or in equity,¹³³ cannot bring himself within one of the first three subdivisions of § 3228, he must recover \$50 to be entitled to costs. If he does not recover that amount the defendant is entitled to costs, by § 3229 of the Code of Civil Procedure.¹³⁴

g. Recovery reduced below \$50 by the interposition of a counterclaim by the defendant.—The defendant is entitled to costs where he reduces the plaintiff's recovery below \$50 by the interposition of a counterclaim.¹³⁵ The plaintiff is not entitled to costs where he fails to recover upon the cause of action set out in his complaint, although the defendant did not recover upon his counterclaim.¹³⁶ In such a case the defendant is entitled to costs. The defendant is also entitled to costs in an action brought to recover for work done under a contract between the plaintiff and himself, which provided that the compensation for the work done should apply upon a debt owing from the plaintiff to the defendant, and thereafter, unbeknown to the defendant, the plaintiff forms a partnership and performs the work, and the recovery is less than \$50.¹³⁷

The defendant is entitled to costs where the plaintiff brings

N. Y. S. R. 67, 19 N. Y. Supp. 959; 72 N. Y. S. R. 434, 36 N. Y. Supp. *Mander v. Bell*, 4 N. Y. Week. Dig. 1032.
519; *Burdick v. Hale*, 13 Abb. N. C. 60. ¹³⁵*Gregory v. McArdle*, 1 How. Pr. N. S. 187.

¹³¹*Landsberger v. Magnetic Teleg. Co.* 8 Abb. Pr. 35; *Crane v. Holcomb*, 8 Abb. Pr. 35, note. ¹³³*Thayer v. Holland*, 63 How. Pr. 179; *Shitelegge v. De Witt*, 12 Daly. 319.

¹³²*Peet v. Warth*, 1 Bosw. 653.

¹³³*Murtha v. Curley*, 92 N. Y. 359. 41, 14 N. Y. Supp. 473.

¹³⁴*Norton v. Fancher*, 92 Hun, 463,

¹³⁷*Russell v. Bardes*, 39 N. Y. S. R.

an action for rent and to foreclose a lien on personal property, and it is determined that he has no lien and is entitled to an amount less than \$50 for rent. This is nothing but an action for the recovery of money.¹³⁸ Where the defendant has made an offer of judgment for the whole amount claimed by the plaintiff, less \$150, and as a condition of having the case put over the term has been compelled by the court to stipulate that the plaintiff shall enter judgment without costs for the amount of the offer, and the cause to proceed as to the \$150, the plaintiff is entitled to tax his full bill of costs if he recovers any amount upon the trial.¹³⁹ In this case it will be noticed that the entire recovery exceeded \$50.

h. Recovery reduced below \$50 by payments made after the commencement of the action.—It is the amount recovered in the judgment that fixes the right to costs. The court or referee cannot make any valid order in regard thereto. The party entitled to costs is entitled to them in the absence of an order giving them to him, or in spite of an order giving them to his adversary.¹⁴⁰ If the plaintiff accepts payments unconditionally, which reduce the amount due to less than \$50, and the defendant sets up the payment in his answer, the defendant is entitled to costs.¹⁴¹ A verbal stipulation that the payment shall not affect the right to costs cannot be enforced by the courts, as that is within the provisions of Rule 11.¹⁴² There are *obiter* remarks that the plaintiff can protect his right to costs by accepting the money on condition that it should not affect his right to a judgment for the full amount, but that he will credit it on the execution.¹⁴³ This

¹³⁸*Trust v. Pirson*, 1 Hill. 292, Aff. Y. Week. Dig. 186, 13 N. Y. S. R. 302; *Bendit v. Annesley*, 42 Barb. 302; *Bendit v. Annesley*, 42 Barb. 302.

¹³⁹*Hoe v. Sanborn*, 36 N. Y. 93, 3 Abb. Pr. N. S. 189, 35 How. Pr. 197. 192, 27 How. Pr. 184; *Keller v. Van Wie*, 49 How. Pr. 97.

¹⁴⁰*Bates v. Norris*, 23 Jones & S. 269. ¹⁴²*Bates v. Norris*, 23 Jones & S. 269, 13 N. Y. Civ. Proc. Rep. 395, 13 N. Y. S. R. 302, 28 N. Y. Week. Dig. 186.

¹⁴¹*Rice v. Childs*, 28 Hun. 303; *Bates v. Norris*, 23 Jones & S. 269, 13 N. Y. Civ. Proc. Rep. 395, 28 N. Y. Week. Dig. 186. ¹⁴³*Rice v. Childs*, 28 Hun. 303.

agreement would have to be in writing to escape the provisions of Rule 11. If the payment is made after the defendant's time to answer has expired, the defendant can take advantage of the payment only by serving a supplemental answer, after having obtained leave of the court. Upon such an application the plaintiff should protect his right to costs.¹⁴⁴

i. Recovery increased above \$50 by the addition of interest which has accrued since the commencement of the action.—If the amount due the plaintiff at the time of the commencement of the action is less than \$50, but at the time of the verdict the accrued interest makes the recovery more than \$50, the plaintiff is entitled to costs.¹⁴⁵

j. Miscellaneous cases where the recovery was less than \$50.—In case of a default of pleading upon the part of the defendant, the plaintiff can wait before entering judgment until the accrued interest makes the entire sum due more than \$50, and thus he would be entitled to costs. In such a case the defendant can serve an offer of judgment. There is a lack of harmony in the cases as to whether the defendant is or is not entitled to costs where the plaintiff accepts an offer of judgment for less than \$50 "with costs."

The better rule is that the defendant is entitled to costs in such cases.¹⁴⁶ It has been held, however, that the offer is in effect a stipulation that the plaintiff may have costs, and thus the defendant has waived his right to costs. The costs to which the plaintiff is entitled under the offer are his legal costs. He has no legal costs, and therefore neither party is entitled to costs.¹⁴⁷

¹⁴⁴*Bates v. Norris*, 23 Jones & S. 269, 13 N. Y. Civ. Proc. Rep. 395, 28 N. Y. Week. Dig. 186, 13 N. Y. S. R. 302. ¹⁴⁶*Johnson v. Sagar*, 10 How. Pr. 552. ¹⁴⁷*Moffett v. Deom*, 8 N. Y. Civ. Proc. Rep. 85.

¹⁴⁵*Loring v. Morrison*, 25 App. Div. 139, 5 N. Y. Anno. Cas. 151, 48 N. Y. Supp. 975.

The defendant is entitled to costs where the plaintiff recovers less than \$50 in an action for breach of promise to marry,¹⁴⁸ or for conversion.¹⁴⁹ It was decided under the Code of Procedure that the defendant was entitled to costs in an action for damages for a false return by a justice of the peace, unless the plaintiff recovers \$50.¹⁵⁰

It was held in a later case that the plaintiff was entitled to a full bill of costs if he recovered any amount in an action for damages against a sheriff for making a false return.¹⁵¹ The wording of the Code of Procedure was different from the present Code, and these cases are, doubtless, not now applicable.

The defendant is entitled to costs in an action against him for damages for injuries received through his negligence, unless the plaintiff recovers at least \$50.¹⁵² There is a special term decision of the superior court, made in 1887, which holds that in such actions the plaintiff is entitled to costs equal to the amount of the verdict.¹⁵³ It has also been held that where the plaintiff recovers any amount, he is entitled to a full bill of costs.¹⁵⁴ But these decisions seem to have been made without due consideration, and have been criticised by the later decisions.

¹⁴⁸*Seitz v. Berg*, 2 N. Y. City Ct. Civ. Proc. Rep. 315, 15 N. Y. Supp. Rep. 294.

¹⁴⁹*Ryan v. Doyle*, 40 How. Pr. 215; *Union Exp. Co.* 56 N. Y. 585; *Gorton v. United States & B. Mail S. S. Co.*

¹⁵⁰*Worden v. Brown*, 14 How. Pr. 20 N. Y. Civ. Proc. Rep. 202, 32 N. Y. S. R. 556, 13 N. Y. Supp. 653.

¹⁵¹*Whitney v. Daggett*, 6 Abb. N. C. 134. ¹⁵²*Garrabrant v. Sullivan*, 13 N. Y. Civ. Proc. Rep. 196.

¹⁵³*Ruger v. Fahy's Watch Case Co.* 20 N. Y. Civ. Proc. Rep. 204, 37 N. Y. S. R. 400, 13 N. Y. Supp. 788; *Kaliski v. Pelham Park R. Co.* 20 N. Y. 414. ¹⁵⁴*Reichel v. New York C. & H. R. Co.* 18 N. Y. Civ. Proc. Rep. 240, 29 N. Y. S. R. 843, 9 N. Y. Supp.

CHAPTER IX.

ACTIONS IN WHICH COSTS ARE IN THE DISCRETION OF THE COURT.

105. In general.
106. In what courts.
107. When and how this discretion can be reviewed.
108. Costs; how awarded and reviewed when action is tried before referee.
109. Costs; how awarded when the action is tried by the court.
110. Costs; how awarded when part of the issue is tried by a jury and part by the court.
111. Costs where the cause of action has terminated before the trial.
112. Costs where the defendant makes an offer in his pleading.
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114. What pleading determines the fact that costs are in the discretion of the court.
115. Costs where there has been a multiplicity of actions.
116. Contribution of costs among wrongdoers.
117. Liability of successor in interest in an action where costs are discretionary.
118. Costs where the question involved is novel.

105. In general.— A party to an action is not entitled, upon its successful determination, to costs as a matter of right, unless he can bring himself within one of the provisions of § 3228 or § 3229 of the Code of Civil Procedure. In all actions not within the provisions of those sections, whether costs shall be awarded or not, and if so, to whom, and the amount, not exceeding the amount authorized by statute, rests in the discretion of the court,¹ even in an action against an executor.²

106. In what courts.— The discretion extends to every stage

¹ Code Civ. Proc. § 3230.

Pr. 504; *Black v. O'Brien*, 23 Hun.

² *Church v. Kidd*, 3 Hun. 254, 5 82; *Herrington v. Robertson*, 71 N. Thomp. & C. 454; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Barker v. N. Y. S. R.* 431, 26 N. Y. Supp. 94; *White*, 3 Keyes, 617, 5 Abb. Pr. N. S. *Kahn v. Schmidt*, 83 Hun. 541, 65 124, 1 Abb. App. Dec. 95, 41 How. N. Y. S. R. 190, 32 N. Y. Supp. 33.

of the cause, including an appeal to the court of appeals.³ The court of appeals in such actions can grant the costs of every court,⁴ when it reverses or modifies a judgment.

107. When and how this discretion can be reviewed.—"The question of costs, therefore, in an equity action is one of the issues involved; it is primarily presented at the trial court, and while, as a rule, the appellate tribunals will not interfere with the discretion exercised by the court below, yet, as it furnishes one of the issues for determination by appellate tribunals, it is always before such court for disposition, together with the other issues which the case presents."⁵ The appellate division of the supreme court can modify a judgment by allowing costs where they were refused below, or can strike them out when granted below.⁶ Such discretion is not reviewable by the court of appeals,⁷ even if there has been an abuse of discretion.⁸

The trial court has no power to add to or take away any costs awarded by the appellate court. It must enter the judgment as directed by the appellate court, and it has no power to do anything else.⁹ It is only in exceptional cases that costs are refused to the prevailing party in equity actions.¹⁰ The successful party to whom costs are denied has a right to appeal from such determination. The imposition of costs in equity cases is discretionary, still the discretion is not arbitrary. The appellate court will not reverse the discretion of the court below, where there is a reasonable basis for its exercise.¹¹

³*Chipman v. Montgomery*, 63 N. Y. 104, 52 N. E. 645; *Herrington v. Robertson*, 71 N. Y. 280; *Dill v. Wisner*, 88 N. Y. 153.

⁴*Murtha v. Curley*, 92 N. Y. 359, 65 How. Pr. 68, 3 N. Y. Civ. Proc. Rep. 266; *Munro v. Tousey*, 129 N. Y. 38, 14 L. R. A. 245, 41 N. Y. S. R. 127, 29 N. E. 9.

⁵*Hascall v. King*, 54 App. Div. 441-444, 66 N. Y. Supp. 1112.

⁶*Hammond v. Slocum*, 50 How. Pr. 415.

⁷*Husted v. Van Ness*, 158 N. Y.

⁸*Staiger v. Schultz*, 3 Keyes, 614, 3 Abb. Pr. N. S. 377.

⁹*Hascall v. King*, 54 App. Div. 441-444, 66 N. Y. Supp. 1112.

¹⁰*Proctor v. Soulier*, 8 App. Div. 69, 40 N. Y. Supp. 459.

¹¹*Husted v. Van Ness*, 1 App. Div. 120, 72 N. Y. S. R. 28, 36 N. Y. Supp. 1043.

In equity actions the trial justice must designate the party entitled to costs, even where he adopts the practice of stating his decision concisely.¹²

108. Costs; how awarded and reviewed when action is tried before referee.—In equity actions tried before a referee, costs must be awarded by him.¹³ If he does not award them, none can be taxed.¹⁴ The judgment entered upon the report of the referee should contain the costs awarded in the action.¹⁵ Where the referee has simply allowed costs to the defendants, not specifying that costs should go to each defendant, the special term has no power to award a separate bill of costs to each defendant.¹⁶ His discretion cannot be reviewed by motion, but only by excepting to the findings and appealing from the judgment entered on the report.¹⁷

Although a referee has used his discretion unwisely in the matter of granting costs, that is not necessarily an adequate reason for reversing the judgment.¹⁸ His discretion will be reversed only in cases of palpable abuse.¹⁹ The prevailing party can move for directions for the referee to pass upon the question of costs²⁰ where he has failed to make any decision in relation thereto.

¹²*Reynolds v. Aetna L. Ins. Co.* 6 App. Div. 254, 39 N. Y. Supp. 885.

¹³Code Civ. Proc. § 1022; *Woodford v. Bucklin*, 14 Hun, 444.

¹⁴*Coddington v. Bowen*, 2 Sily. Sup. Ct. 417, 24 N. Y. S. R. 832, 6 N. Y. Supp. 355; *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958; *Stevens v. Weiss*, 25 Misc. 457, 55 N. Y. Supp. 562; *Graves v. Blanchard*, 4 How. Pr. 300, 3 N. Y. Code Rep. 25; *Phelps v. Wood*, 46 How. Pr. 1; *Ludington v. Taft*, 10 Barb. 447.

¹⁵*Mason v. Corbin*, 29 App. Div. 602, 51 N. Y. Supp. 178.

¹⁶*Nassau Bank v. National Bank*, 32 App. Div. 268, 52 N. Y. Supp. 1118.

¹⁷*Woodford v. Bucklin*, 14 Hun, 444; *Rosa v. Jenkins*, 31 Hun, 384;

McBride v. Chamberlain, 56 N. Y. S. R. 431, 26 N. Y. Supp. 94; *Graves*

v. Blanchard, 4 How. Pr. 300, 3 N. Y. Code Rep. 25; *Kennedy v. McKone*, 10 App. Div. 97, 41 N. Y. Supp. 577; *Willey v. Robinson*, 85 Hun, 362, 66 N. Y. S. R. 423, 32 N. Y. Supp. 1018.

¹⁸*Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57.

¹⁹*Barker v. White*, 3 Keyes, 495, 5 Abb. Pr. N. S. 127, 1 Abb. App. Dec. 98.

²⁰*Phelps v. Wood*, 46 How. Pr. 1.

The referee may order the plaintiff to pay a part of the costs and the defendant the balance.²¹ Where the defendant was successful up to the court of appeals, which reversed the courts below and granted a new trial, costs to abide the event, upon which both parties succeeded in part, the plaintiff should be allowed costs up to and including the court of appeals, as he was compelled to go to that court to correct the error, but neither should be allowed costs for subsequent proceedings.²² The appellate division has a right to send back to the referee who tried the case and once passed upon it, the question of costs, to be heard *de novo* upon the evidence contained in the printed case. No appeal lies to the court of appeals from such an order. It is a matter of practice, over which the appellate division had jurisdiction.²³

109. Costs; how awarded when the action is tried by the court.—

Costs must be granted by the court, without such an order no costs are awarded.²⁴ The court may upon motion pass upon the question of costs where it has neglected to do so upon the trial. It may grant costs upon a motion to strike out costs which have been taxed without authority.^{24a} Costs should be granted by the trial judge. The appellate division has no power to send the case back to the special term to pass upon the question of costs, when the trial judge has made no direction as to costs.²⁵ Silence upon the subject of costs is a refusal thereof.²⁶

Where the court has passed upon the merits of the case and awarded costs in an interlocutory judgment, it cannot change the allowance of costs in the final judgment entered upon the

²¹*Barker v. White*, 3 Keyes, 617, 1 Abb. App. Dec. 95, 41 How. Pr. 504, 5 Abb. Pr. N. S. 124. ^{24a}*Andrews v. Moller*, 20 N. Y. Week. Dig. 377.

²²*Manderille v. Avery*, 44 N. Y. S. 328; *First Nat. Bank v. Levy*, 41 R. 1, 17 N. Y. Supp. 429. ²⁵*Le Roy v. Browne*, 10 N. Y. Supp. Hun, 461.

²³*Taylor v. Root*, 48 N. Y. 687. ²⁶*Le Roy v. Browne*, 10 N. Y. Supp.

²⁴*Hascall v. King*, 54 App. Div. 328; *Commissioners of Pilots v. 441. 31 N. Y. Civ. Proc. Rep. 207, 66 Spofford*, 3 Hun, 55.
N. Y. Supp. 1112; *Downing v. Marshall*, 37 N. Y. 380; *Krcitz v. Frost* 55 Barb. 474.

report of a referee, who has been appointed to take proof of the accounts between the parties.²⁷

110. Costs; how awarded when part of the issue is tried by a jury and part by the court.—In an action for an injunction, where the jury found that the plaintiff had suffered no damage, and upon the trial of the balance of the case before the court it decided that the plaintiff had suffered damages large enough to carry costs, the costs were determined by the judgment, and not by the verdict.²⁸

111. Costs where the cause of action has terminated before the trial.—An equity case will be heard, although before the trial the subject-matter has ceased to exist, in order that the question of costs, as it existed at the time of the commencement of the action, may be determined,²⁹ although a litigation for costs in equity courts is not favored.³⁰ Courts will refuse to examine into the merits of a case after settlement, to see who is entitled to costs.³¹ Neither party will be allowed costs where the plaintiff brings an action to cancel a deed and a mortgage, and for an accounting of rents, and succeeds in the action, where the debt owing by the plaintiff to the defendant had been paid by rents, and the last instalment was paid after the commencement of the action.³² The plaintiff will not be obliged to pay costs upon the dismissal of his complaint in an action for the construction of a will and an accounting, where after the commencement of the action the parties practically agreed that the matters should be settled in the surrogate's court, because he might have had a cause of action at the time of the commencement of the action.³³ Where a complaint is dismissed by reason of events occurring

²⁷*Foley v. Foley*, 15 App. Div. 276, 425, Reversed on other questions in 44 N. Y. Supp. 588. 63 N. Y. 547.

²⁸*Wallace v. American Linen Thread Co.* 16 Hun. 404; *Toch v. Toch*, 9 App. Div. 501, 41 N. Y. Supp. 353. ³¹*Eastburn v. Kirk*, 2 Johns. Ch. 317.

³²*Cross v. Smith*, 85 Hun. 49, 66 N. Y. S. R. 55, 32 N. Y. Supp. 671.

²⁹*Kelley v. McMahon*, 37 Hun. 212. ³³*Parker v. Murray*, 57 N. Y. S. R. 949, 14 N. Y. Supp. 79.

³⁰*Belmont v. Ponvert*, 6 Jones & S.

since the commencement of the action, it should be without costs.³⁴

112. Costs where the defendant makes an offer in his pleading.— The defendant will not be compelled to pay costs when, in his answer, he offers the plaintiff all the relief to which the court decides he is entitled.³⁵ The defendant will be compelled to pay costs where the plaintiff succeeds only as to part of the relief sought, and the defendant makes no offer of judgment.³⁶ The defendant will be entitled to costs where the complaint does not offer to do equity, and he is compelled to come into the court to obtain his equitable rights.³⁷

113. Costs where both parties are successful.— Costs will be allowed to neither party in an action for two causes of action, where each party succeeds on one.³⁸ A plaintiff will be allowed costs up to and including the trial, where he is entitled to some relief, but not to as much as he claimed in his complaint. The defendant will be allowed costs subsequent to the trial, where he is successful upon the appeal.³⁹

114. What pleading determines the fact that costs are in the discretion of the court.— The question of costs is determined by the complaint, and not by the answer. The defendant will be entitled to costs, as a matter of right, and not as a matter resting in the discretion of the court, where he succeeds upon an equitable defense interposed to a legal action.⁴⁰ Costs would have

³⁴*Columbia College v. Thacher*, 87 *Leiber*, 7 Paige. 483; *Crippen v. N. Y.* 311, 41 *Am. Rep.* 365, 10 *Abb. Heermance*, 9 Paige. 211; *Barker v. N. C.* 235. *Lancy*, 7 App. Div. 352, 40 *N. Y. Supp.* 66; *Stafford v. Nott*, 3 Paige, 100; *Ten Eyck v. Holmes*, 3 *Sanat. Ch.* 428; *West v. Utica*, 71 *Hun.* 540.

³⁵*Bickford v. Searles*, 9 App. Div. 158, 41 *N. Y. Supp.* 148.

³⁶*Rutty v. Person*, 20 *Jones & S.* 329. 51 *N. Y. S. R.* 911, 24 *N. Y. Supp.* 1075; *Cross v. Smith*, 85 *Hun.* 49, 66

³⁷*Bissell v. Kellogg*, 60 *Barb.* 617. 1075; *Cross v. Smith*, 85 *Hun.* 49, 66

³⁸*Law v. McDonald*, 9 *Hun.* 23, 3 *N. Y. S. R.* 55, 32 *N. Y. Supp.* 671.

³⁹*Sternbach v. Friedman*, 75 App. Div. 418, 78 *N. Y. Supp.* 318.

⁴⁰*Cythe v. La Fontain*, 51 *Barb.* 186; *Lanz v. Trout*, 46 *How. Pr.* 54;

33, 48 *N. Y. Supp.* 26; *Caldwell v.*

been in the discretion of the court had the plaintiff brought an equitable action for the same relief.⁴¹ The plaintiff will not be compelled to pay costs where the defendant sets up a counterclaim, and becomes insolvent, but refuses to allow the plaintiff to discontinue without costs, and on the trial the plaintiff makes no proof of his cause of action, but the defendant attempts to prove his counterclaim and fails.⁴² Costs out of a fund belonging to the plaintiff will not be allowed to the unsuccessful defendant, although he was sued as administrator.⁴³

115. Costs where there has been a multiplicity of actions.—Costs of only one action will be allowed, when the plaintiff could have obtained all the relief to which he was entitled in one action but he has brought two or more actions.⁴⁴

116. Contribution of costs among wrongdoers.—A defendant who has been compelled to pay costs cannot complain that his co-defendant, with whom he has entered into a fraudulent scheme to set aside which the action was brought, has not been compelled to pay costs, as there is no contribution among wrongdoers.⁴⁵

117. Liability of successor in interest in an action where costs are discretionary.—A city which has annexed a village will not be liable for costs in a successful action to restrain the city from collecting the tax, and to set aside the assessment levied by the village, because the city was not responsible for the acts complained of.⁴⁶

118. Costs where the question involved is novel.—A defendant may be exonerated from paying costs, although defeated, if the

Bradley v. Aldrich, 40 N. Y. 509, 100 Am. Dec. 528.

⁴¹*Cythe v. La Fontain*, 51 Barb. 186.

⁴²*McCulloch v. Vibbard*, 14 N. Y. Civ. Proc. Rep. 388, 16 N. Y. S. R. 1012, 1 N. Y. Supp. 610.

⁴³*Sheehan v. Huerstel*, 14 Jones & S. 64.

⁴⁴*Munro v. Tousey*, 36 N. Y. S. R. 522, 13 N. Y. Supp. 81, Reversed on

other grounds in 129 N. Y. 38, 41 N. Y. S. R. 127; *Wendell v. Wendell*, 3 Paige, 509; *Neuman v. Ogden*, 6 Ch. Sent. 40.

⁴⁵*Holden v. New York & E. Bank*, 72 N. Y. 286.

⁴⁶*Tredwell v. Brooklyn*, 11 App. Div. 224, 43 N. Y. Supp. 458. *Contra*, *Richter v. New York*, 24 Misc. 613, 54 N. Y. Supp. 150.

case is novel, and the law is unsettled. A husband was not allowed costs, although he succeeded in an action to have advances made by him declared a lien on his wife's property.⁴⁷ Where a husband and wife each had a will drawn up at the same time, and by mistake each signed the wrong will, and after the husband's death the wife brought an action to correct the mistake, the court dismissed the complaint because of lack of power to correct the mistake, but without costs, for the reason that the question was novel.⁴⁸

⁴⁷*Alward v. Alward*, 15 N. Y. Civ. Proc. Rep. 151, 17 N. Y. S. R. 864, 41 N. Y. S. R. 1, 16 N. Y. Supp. 273.
⁴⁸*Nelson v. McDonald*, 61 Hun, 406, 2 N. Y. Supp. 42.

CHAPTER X.

COSTS IN REAL ACTIONS.

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119. Foreclosure of mortgage by advertisement.—The allowance or refusal of costs in actions of foreclosure by advertisement is in the discretion of the court.¹

In a foreclosure by advertisement a charge for a copy for the printer and for one to keep, and a charge for publication for thirteen weeks, are allowable, but a charge cannot be made for inserting what is not required by law to be inserted, nor for serving persons not required to be served, although it may be prudent to serve them; nor can a charge be made for notices attached to affidavits that are required to be filed, when one notice could be used. Neither can a charge be made for a copy of notice of sale, served upon the auctioneer, when he is the attorney for the plaintiff, and a charge has been made for an office copy.² These items must be taxed on notice.³ The amount of costs and disbursements in these actions is regulated by §§ 2401–2403 of the Code of Civil Procedure.

120. Foreclosure of mortgage by action. *a. In general.*—Costs in a mortgage foreclosure are in the discretion of the court.⁴ No costs will be allowed where both parties succeed as to a part of the matters litigated.⁵

b. Liability of defendant by appearing in the action.—A defendant will not make himself liable for costs simply by appear-

¹*O'Hara v. Brophy*, 24 How. Pr. 379. ⁴*Morris v. Wheeler*, 45 N. Y. 708;

²*Ferguson v. Wooley*, 9 N. Y. Civ. Proc. Rep. 236; *Pratt v. Ramsdell*, 16 How. Pr. 59; *Collins v. Standish*, 16 How. Pr. 493; *Hornby v. Cramer*, 364, 7 Abb. Pr. 339.

12 How. Pr. 490.

³*Re Moss*, 6 How. Pr. 263.

⁵*Cross v. Smith*, 85 Hun. 49, 66 N. Y. S. R. 55, 32 N. Y. Supp. 671.

ing in the action, and demanding that all papers be served upon his attorney.⁶

c. Liability of defendant by serving an answer.—A prior assignor of the mortgage is a proper, but not a necessary, party defendant. His answer admitting the assignment is a benefit to the plaintiff, who can take judgment with this answer in; and where the answer is stricken out, no costs should be allowed.⁷

d. When the wife of the mortgagor is entitled to costs.—In foreclosing a mortgage not for purchase money, given by a married man after his marriage, the wife not joining, she is not a necessary party. Where made a party and notice given that judgment should not affect her inchoate dower rights, she cannot recover costs against the plaintiff by defending the action, as that is unnecessary to protect her rights. On the other hand, in such case costs will not be allowed against her, for the reason that the plaintiff unnecessarily made her a party.⁸ A wife of the second mortgagee will not be allowed costs against the plaintiff, where she is made a party to cut off her inchoate right of dower, and the action is continued to fix the liability on the land, after the premises have been sold on a first mortgage and the surplus paid upon the second mortgage.⁹

e. Answer setting up payment since the commencement of the action.—An answer setting up the payment of the bond and mortgage after the commencement of the action should not be stricken out as sham on the ground that the defendant had not paid costs. Costs are in the discretion of the court, and it is not certain that the plaintiff will be allowed any.¹⁰

f. Report of the referee.—The report of a referee, which awards costs to the plaintiff, will not authorize a judgment giv-

⁶*Tully v. Eastburn*, 1 Month. L. Bull. 74.

⁸*Barker v. Barton*, 67 Barb. 458.

⁹*McRoberts v. Pooley*, 12 N. Y. S.

⁷*Merrill v. Bischoff*, 3 App. Div. R. 107.

361, 73 N. Y. S. R. 685, 38 N. Y. Supp. 194.

¹⁰*Wetmore v. Gale*, 2 N. Y. Week. Dig. 408.

ing costs against the defendant personally. The report must provide that the defendant be held personally for costs before such a judgment can be entered.¹¹ After a case was tried before a judge, who awarded judgment for the plaintiff without awarding costs, but sent it to a referee to ascertain the amount due and whether there were any prior liens, upon the coming in of the report the plaintiff, without notice to the defendant, was awarded costs, at a special term held by another judge.¹²

g. Costs in an unnecessary action.—The holder of a first mortgage will not be allowed costs of foreclosing his mortgage, where, before the commencement of the action, the holder of the second mortgage has commenced his action, making the first mortgagee a party, and has asked that the amount due on the first mortgage be ascertained and paid. The second action is unnecessary.¹³ A plaintiff will be refused costs where he has caused the defendant to delay paying the balance of interest until the time has expired, so that the plaintiff can elect that the whole amount secured by the mortgage become due, and he will be allowed to foreclose only for the balance of interest.¹⁴ But after an election once fairly made, that the entire amount should become due for failure to pay an instalment of principal or interest, the plaintiff cannot be compelled to accept the unpaid instalment and costs to date.¹⁵

h. Offer of judgment.—The plaintiff has no absolute right to costs in an action to foreclose a mortgage, until they are granted by the court. On the other hand a defendant in such an action has no right to tender the amount due, and stop the action.¹⁶ If

¹¹*Case v. Mannis*, 19 N. Y. Civ. Affirmed in 102 N. Y. 713, 7 N. E. Proc. Rep. 296, 33 N. Y. S. R. 44, 11 428.

N. Y. Supp. 243.

¹²*Rosche v. Kosmowski*, 61 App.

¹³*Chamberlain v. Dempsey*, 36 N. Div. 23, 70 N. Y. Supp. 216.

Y. 144.

¹⁴*New York F. & M. Ins. Co. v.*

¹⁵*Guilford v. Jacobie*, 69 Hun. 420, *Burrell*, 9 How. Pr. 398, 12 N. Y. 52 N. Y. S. R. 837, 23 N. Y. Supp. Legal Obs. 252.

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¹⁶*House v. Eisenlord*, 30 Hun. 90,

the defendant wishes to settle such an action he may offer to pay the plaintiff the amount of his mortgage and such costs as he thinks proper. If the plaintiff refuses to accept the offer, the defendant may apply to the court for leave to pay the amount due, and such costs as the court may determine, and have the case discontinued.¹⁷ An offer of judgment may also be made under the provisions of § 738 of the Code of Civil Procedure. The offer should not only authorize a judgment for foreclosure and sale of the mortgaged premises for a certain amount, but should also authorize the entry of a deficiency judgment against the party liable upon the bond, with costs.¹⁸ A party liable upon the bond, who purchases the bond and mortgage pending suit, and pays an additional allowance under protest, cannot recover back the sum thus paid under protest, as such sum is not paid under a mistake of fact or of law.¹⁹

i. Commissions.—The plaintiff is entitled to half commissions under § 3252 of the Code of Civil Procedure, as upon a settlement, when, after the commencement of an action to foreclose a mortgage, he assigns it to one of the defendants.²⁰

j. Additional allowance.—(See also § 302, subd. i, *infra*.) An additional allowance in a mortgage foreclosure action is limited by § 3253 of the Code of Civil Procedure to \$200, although the case is difficult and extraordinary, and a defense is interposed.²¹ The fact that the action is brought to foreclose a chattel mortgage as well as a mortgage on real estate will not entitle the plaintiff to an allowance in excess of \$200.²² Nor can the

¹⁷*Bartow v. Cleveland*, 7 Abb. Pr. 339, 16 How. Pr. 364; *Pratt v. Ramsdell*, 7 Abb. Pr. 340, note.

¹⁸*Rollins v. Barnes*, 23 App. Div. 240, 5 N. Y. Anno. Cas. 153, 48 N. Y. Supp. 779.

¹⁹*Bliss v. Wallis*, 3 How. Pr. N. S. 325.

²⁰*Cherers v. Damen*, 37 N. Y. S. R. 904, 13 N. Y. Supp. 452.

²¹*Waterbury v. Tucker & C. Cordage Co.* 152 N. Y. 610, 46 N. E. 959; *Hunt v. Chapman*, 62 N. Y. 333, 338;

Ferris v. Hard, 15 N. Y. Civ. Proc. Rep. 171, 17 N. Y. S. R. 364, 4 N. Y. Supp. 9; *O'Neill v. Gray*, 39 Hun, 566; *Rosa v. Jenkins*, 31 Hun, 384.

²²*Waterbury v. Tucker & C. Cordage Co.* 152 N. Y. 610, 46 N. E. 959.

court grant an allowance in excess of \$200, even when the action has been unreasonably defended.²³

It has been held in the supreme court that in an action to foreclose a chattel mortgage the limitation of \$200 did not apply.²⁴ The court of appeals has said, *obiter*, that the wording of the limitation was broad enough to cover all kinds of mortgages.²⁵

k. Liability of party who has assumed the mortgage debt.—A party who has assumed and agreed to pay a mortgage may be compelled to pay the costs of the foreclosure action, to which he was not a party, by a party who has been compelled to pay the same.²⁶

l. Surplus proceedings.—The only costs allowed upon surplus proceedings, besides the fees of the referee and other disbursements, are \$10 costs of motion for appointment of a referee, if allowed by that order, and \$10 costs of motion to confirm the referee's report, if allowed.²⁷ There have been *obiter* remarks in old cases, that a successful party might be entitled to a trial fee, but there seems to be no warrant for such a fee.²⁸ The holder of a second mortgage is entitled to have the costs of the action brought to foreclose his mortgage paid out of the surplus paid into the court upon the foreclosure of the first mortgage, although those costs were not awarded until after a sale of the premises under the first mortgage.²⁹ The result would be different if the action related to the rights of the parties in the land,

²³*Bidwell v. Sullivan*, 4 N. Y. Anno. Cas. 161, 26 N. Y. Civ. Proc. Rep. 392, 45 N. Y. Supp. 530.

²⁴*Huntington v. Moore*, 59 Hun, 351, 13 N. Y. Supp. 97.

²⁵*Waterbury v. Tucker & C. Cordage Co.* 152 N. Y. 610, 46 N. E. 959.

²⁶*Comstock v. Drohan*, 8 Hun, 373, Affirmed in 71 N. Y. 9, without passing on this point.

²⁷*McDermott v. Hennesy*, 9 Hun, 59; *Elwell v. Robbins*, 43 How. Pr. 108; *Rensselaer & S. R. Co. v. Davis*, 55 N. Y. 145; *Wellington v. Uls-*

ter County Ice Co. 5 N. Y. Week. Dig. 104; *German Sav. Bank v. Sharer*, 25 Hun, 409; *Re Gibbs*, 58 How. Pr. 502; *Floyd v. Clark*, 16 Daly, 528, 17 N. Y. Supp. 848; *Borland v. Allcond*, 8 Daly, 126.

²⁸*Borland v. Allcond*, 8 Daly, 126; *Elwell v. Robbins*, 43 How. Pr. 108; *New York Life Ins. & T. Co. v. Vanderbilt*, 12 Abb. Pr. 458.

²⁹*Bushwick Sav. Bank v. Traum*, 26 App. Div. 532, 50 N. Y. Supp. 542.

and before judgment was obtained, which awarded costs against the defendant personally, and not on the land, the property had been sold on a mortgage foreclosure, and a surplus resulted.³⁰ The costs of the reference may be ordered paid out of the fund,³¹ or by the unsuccessful party upon the reference. This rests in the discretion of the court, and this discretion can be reviewed by the same court in appellate term, but it cannot be reviewed by the court of appeals.³² Unsuccessful claimants may be made to pay the extra expense to which the successful claimant has been put by reason of their claims.³³ But where there is a good reason to investigate the successful party's claim, and not much work is necessitated by the unsuccessful claim, no costs should be charged against the unsuccessful claimant.³⁴ In a surplus proceeding where the widow and heirs are the claimants, the widow, who has agreed to accept a gross sum in lieu of dower should not be charged with any expense of the proceeding.³⁵

Liens subsequent to an easement are entitled to be satisfied prior to the costs of an action brought to establish that easement, although they are recorded after the filing of the *lis pendens* in the action to establish the easement.³⁶

m. Allowance to receiver of rents.—A receiver of rents will not be allowed counsel fees, when his attorney advises him to disregard his duty as such receiver, and act for his own personal gain.³⁷

n. Liability of referee.—A referee should be made to pay the costs of an appeal from an order which requires him to pay into

³⁰*Crocker v. Lewis*, 144 N. Y. 140, Y. Supp. 463; *Farmers' Loan & T.* 39 N. E. 1; *Bushwick Sav. Bank v. Co. v. Millard*, 9 Paige, 620.

Traum, 26 App. Div. 532, 50 N. Y. Supp. 542. ³⁴*Dudgeon v. Smith*, 23 N. Y. Week. Dig. 400.

³²*Oppenheimer v. Walker*, 3 Hun, 30, 5 Thomp. & C. 325. ³⁵*Campbell v. Erving*, 43 How. Pr. 258.

³³*Hyman v. Hauß*, 138 N. Y. 48, 51 N. Y. S. R. 731, 33 N. E. 735. ³⁶*Crocker v. Lewis*, 79 Hun, 400, 61 N. Y. S. R. 503, 29 N. Y. Supp. 798.

³⁷*Lawton v. Sager*, 11 Barb. 349; *Ranney v. Peyser*, 20 Hun, 11, 5 Bemis v. Thrall, 35 Misc. 137, 70 N. Abb. N. C. 246.

court the surplus, as shown by the judgment and his report of sale, when he claims by affidavit that the terms of sale provided that he should pay the first mortgage out of the first proceeds of sale, the owner of which was not a party to the action. The referee not having made a proper report, and not having followed the provisions of the judgment, should pay the costs incurred in correcting his error.³⁸

o. Costs upon redemption from the mortgagee.—The plaintiff in an action to redeem from the mortgagee in possession is usually required to pay the costs of the action.³⁹ Any unreasonable resistance by the defendant, or any unconscionable defense, will take the case out of the general rule.⁴⁰ The costs of an unsuccessful appeal by the defendant may be ordered paid by him.⁴¹ If the plaintiff wishes to exempt himself from the payment of the defendant's costs, he should tender the defendant the amount due upon the mortgage before bringing an action.⁴² A plaintiff in an action to redeem will not be required to pay the costs of a foreclosure, ineffectual as to him.⁴³ Costs are properly refused to the successful defendant, where he succeeds by reason of the statute of limitations.⁴⁴

p. How the discretion of the trial court in awarding costs can be reviewed.—A party desiring to review the discretion of the trial court in awarding costs must himself appeal from the judge-

³⁸*Koch v. Purcell*, 13 Jones & S. Am. Dec. 538; *Stoddard v. Whiting*, 46 N. Y. 627; *Belden v. Slade*, 26

³⁹*King v. Duntz*, 11 Barb. 191; *Hum*, 635; *Slee v. Manhattan Co.* 1 Paige, 48; *Van Buren v. Olmsted*, 5 Paige, 9.

⁴⁰*Bennett v. Cook*, 2 Hum, 526. 5 *Thomp. & C.* 134.

⁴¹*Shearer v. Field*, 6 Misc. 189. 27 N. Y. Supp. 29; *Benedict v. Gilman*, 4 Paige, 58; *King v. Duntz*, 11 Barb. 191.

⁴²*Belden v. Slade*, 26 Hum. 635; *Benedict v. Gilman*, 4 Paige, 58.

⁴³*Demarest v. Wynkoop*, 3 Johns. Ch. 129. 8 Am. Dec. 467.

⁴⁴*Parker v. Austin*, 15 N. Y. Week. Dig. 474; *Vroom v. Ditmas*, 4 Paige, 526; *Vaylor v. Coltrille*, 20 App. Div. 581, 47 N. Y. Supp. 267; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65. 8

ment. The appellate court will not review the discretion of the trial court in refusing costs to the plaintiff upon the appeal of a defendant.⁴⁵

q. Discretion reviewed by the court of appeals.—The plaintiff is not entitled to costs where there is a defect of parties which is set up by answer, and the defect is obviated after the service of answer and before trial. The court of appeals will reverse an allowance of costs which the court below has made under a mistaken view of the law, although, if the same allowance had been made under a correct view of the law, the court of appeals would not have reviewed the discretion of the court below, although it believed that the allowance was unjust.⁴⁶ It is not unjust to compel the defendant, who did not pay his debt, to pay an allowance to a special guardian of an infant who is properly made a party.⁴⁷

121. Foreclosure of a land contract.—It is usual in foreclosing a land contract or other lien upon property, to charge the funds realized from the sale of the property with the costs of the action unless some good reason is shown why the lienor should not receive the protection of having his reasonable costs and expenses paid, so that he may realize his debt, if the property is sufficient for that purpose.⁴⁸

But an allowance under § 3252 of the Code of Civil Procedure cannot be granted in an action to foreclose a land contract.⁴⁹

122. Foreclosure of a chattel mortgage.—A defendant in an action to foreclose a chattel mortgage is properly chargeable with costs where he unsuccessfully claims a portion of the property.⁵⁰

⁴⁵*Ewell v. Hubbard*, 46 App. Div. 383, 61 N. Y. Supp. 790.

⁴⁹*Burkhart v. Babcock*, 2 How. Pr. N. S. 512.

⁴⁶*Morris v. Wheeler*, 45 N. Y. 708.

⁵⁰*McNeeley v. Welz*, 20 App. Div.

⁴⁷*Ewell v. Hubbard*, 46 App. Div. 383, 61 N. Y. Supp. 790.

⁴⁸*Burank v. Babcock*, 3 N. Y. S. R. 458.

A mortgagor has a right to redeem property covered by a chattel mortgage, after a default made in the payment of the money secured by the mortgage, until a foreclosure sale. If the mortgagee unreasonably refuses to allow him to redeem, the mortgagee will be charged, in the discretion of the court, with the costs of an action brought to redeem the property.⁵¹

123. Action to have a deed declared a mortgage.—Costs are properly allowed against a defendant in an action to have a deed declared a mortgage, where the plaintiff succeeds.⁵² Costs are properly allowed against both defendants, a husband and wife, where the husband claims that the instrument is a deed, and his wife claims an inchoate right of dower in the property.⁵³

124. Action to set aside fraudulent conveyances.—In an action to set aside a deed as in fraud of creditors the costs are in the discretion of the court.⁵⁴ A grantor in a deed is liable to his grantee for the costs which the grantee has been compelled to pay in an action to restrict him in the use of land conveyed without restrictions; and also for a reasonable amount for the attorney of the grantee, provided the grantee notified the grantor of the action, and requested him to defend it, which he refused to do.⁵⁵ The notice must be timely. A notice served after the case is in the court of appeals is too late.⁵⁶

125. Action to remove a cloud on the title.—A defendant will be compelled to pay costs whenever his actions force the plaintiff into court to protect his rights. He will be compelled to pay costs where he denies plaintiff's claim of a right of way over his land, and the plaintiff is compelled to bring an action to settle that question, and succeeds.⁵⁷ A defendant will not be allowed

⁵¹*Pratt v. Stilcs*, 9 Abb. Pr. 150, 17 How. Pr. 211.

⁵⁵*Charman v. Tatum*, 54 App. Div. 61, 66 N. Y. Supp. 275.

⁵²*Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588.

⁵⁶*Finton v. Egelston*, 61 Hun, 246, 40 N. Y. S. R. 936, 16 N. Y. Supp. 721.

⁵³*Castleman v. Simpson*, 16 N. Y. Week. Dig. 455.

⁵⁷*Wells v. Tolman*, 88 Hun, 438, 68 N. Y. S. R. 777, 34 N. Y. Supp. 840.

⁵⁴*Black v. O'Brien*, 23 Hun, 82.

costs, although he succeeds in an action brought to remove a cloud on the plaintiff's title, where, by erroneous description, the defendant's deed seems to cover the plaintiff's land, and defendant has given a mortgage, which had been paid off, covering the plaintiff's land. In such a case the defendant should have released the plaintiff's land, to which he had no right, instead of making claim to it.⁵⁸ A wife was charged with the costs of an action against her to have her inchoate right of dower in certain land declared terminated, when her husband's title failed through breach of conditions in the conveyance to him, and she refused to join with her husband in a quitclaim deed.⁵⁹

126. Action to compel the specific performance of a land contract.— Costs will not be allowed to a successful plaintiff in an action to compel a specific performance, where he has not, before the commencement of the action, demanded a conveyance by the defendant. The same rule will obtain, even where a demand and refusal are impossible,—as, in case the defendant is a lunatic, who has received the property by inheritance.⁶⁰

Equity will also refuse costs to the successful party, where he has not acted honestly and fairly with his opponent. The court will not aid a party in his sharp practices by mulcting the defeated party in costs. Costs were refused to a successful defendant in an action for specific performance which could not be enforced because the contract was incomplete, but the plaintiff had expended a large sum of money upon the faith of the contract, and the defendant had sold the interest, to compel the conveyance of which his action was brought, to rivals of the plaintiff.⁶¹

Costs were refused to a successful defendant, because the refusal to convey was not decided enough, and the exact grounds

⁵⁸*Cox v. Clift*, 3 Barb. 481, Affirmed in 2 N. Y. 118.

⁶⁰*Swartwout v. Burr*, 1 Barb. 495.

⁶¹*Kayser v. Arnold*, 16 N. Y. S. R.

⁵⁹*Green v. Reynolds*, 72 Hun. 565, 105, 1 N. Y. Supp. 412.

54 N. Y. S. R. 846, 25 N. Y. Supp. 625.

of the objection to the contract were not stated. The defendant had been undecided and not candid in the refusal to convey, and thus had caused the plaintiff much trouble and expense.⁶²

In the trial of an action to recover back part of the purchase price paid upon a land contract, because of a flaw in the title, the defendant for the first time produced a discharge of an old mortgage which made the title perfect. The defendant had judgment in his favor, but was denied costs, as he had neglected to show the discharge of mortgage to purchaser.⁶³

A defendant will not be compelled to pay costs of an action for specific performance, where that relief is denied, but the action is continued so that the plaintiff may recover damages for the breach of the contract.⁶⁴

Where a purchaser by a land contract refused to complete the purchase on account of a defect in the title, and the owner then sold to a third person, and the contract purchaser brought an action for specific performance against the original owner and wife and the grantee, upon a decision refusing specific performance on account of the flaw in the title, costs were granted to the grantee as he was a necessary party, but were refused to the wife of the original owner, because there was no reason why she should defend. She was made a party so that she could be compelled to join in the deed if the title should be held good, but she had no interest in the property, as she had already conveyed that.⁶⁵

A creditor, when he recovers a debt in an equitable action, should recover costs also, unless there are special and strong reasons to the contrary.⁶⁶ A defendant has been compelled to

⁶²*Cuff v. Dorland*, 50 Barb. 438.

⁶⁶*Couch v. Millard*, 41 Hun, 215;

⁶³*Pangburn v. Miles*, 10 Abb. N. C. 42. *Dilts v. Sweet*, 49 N. Y. S. R. 275, 21 N. Y. Supp. 57.

⁶⁴*Fitzpatrick v. Dorland*, 27 Hun, 291.

⁶⁵*Walton v. Meeks*, 41 Hun, 311.

pay costs in an action brought to compel him to give a mortgage, which action he unsuccessfully defends.⁶⁷

127. Power of court to relieve purchaser from a bid upon a judicial sale.—The court can, upon a motion made in the action, relieve a purchaser from his bid when there is a defect in the title as to a portion of the property purchased, and upon such motion may allow him the costs of the motion and a sum in addition thereto for counsel fee, for examining the title. The discretion of the court in allowing such counsel fee is not reviewable by the court of appeals.⁶⁸

128. Liability of purchaser at a judicial sale in protecting his bid.—A purchaser upon the sale of land for the nonpayment of an assessment, who litigates an action to declare void and vacate the lien of sale and certificate of sale under such assessment, is properly chargeable with costs in the event of the plaintiff succeeding.⁶⁹

129. Partition action. *a. In general.*—Costs in partition are regulated by §§ 1540, 1555, 1559, 1579, and 1580 of the Code of Civil Procedure. The costs in an action for partition are in the discretion of the court.⁷⁰ The fact that an issue of fact in such an action is triable by a jury does not bring the action within § 3228, subd. 1, of the Code of Civil Procedure, thereby entitling the plaintiff to costs, as of course.⁷¹ The contrary has been held in a special term decision.⁷² This decision is undoubtedly erroneous.

b. Costs to the defendant.—In proper cases costs are allowed to the defendant. There has been a considerable diversity of opinion as to the power of the court to allow costs and an extra

⁶⁷*Dilts v. Sweet*, 49 N. Y. S. R. 275, Civ. Proc. Rep. 51, 42 N. Y. S. R. 76, 21 N. Y. Supp. 57. 16 N. Y. Supp. 605; *Wells v. Van-*

⁶⁸*Shriver v. Shriver*, 86 N. Y. 575. *derwerker*, 45 App. Div. 155, 7 N. Y.

⁶⁹*Newell v. Wheeler*, 48 N. Y. 486. Anno. Cas. 73, 60 N. Y. Supp. 1089;

⁷⁰*Austin v. Alcarne*, 61 N. Y. 6; *Henderson v. Scott*, 43 Hun, 22; *Aus-*
Henderson v. Scott, 43 Hun, 22. *tin v. Alcarne*, 61 N. Y. 6.

⁷¹*Weston v. Stoddard*, 22 N. Y. ⁷²*Davis v. Davis*, 3 N. Y. S. R. 163.

allowance to a defendant under § 3253 of the Code of Civil Procedure, where actual partition has been had. The later cases hold that the court has power to grant costs to the defendant under such circumstances,⁷³ although the contrary has been held in earlier cases, which would not now be followed.⁷⁴ It has been held that costs could not be granted to a defendant when no defense was interposed.⁷⁵ These cases were decided prior to the amendment of § 3253 of the Code of Civil Procedure by chapter 299 of the laws of 1899, and are now of no authority. Costs can be granted to the defendant, although he has not interposed any answer.⁷⁶

c. By whom costs should be paid.—The plaintiff should be charged with the costs of persons whom he made defendants, who have no interest in the subject-matter.⁷⁷ Costs in partition should be paid out of the fund, where there has been only the necessary litigation.⁷⁸ In actual partition the costs should be paid according to the shares of the respective owners.⁷⁹ Where one defendant puts in an answer and is defeated upon the issues raised thereby, the costs and expenses of the proceedings, except the costs and expenses of the trial, should come out of the whole proceeds. The costs and disbursements of the trial should come out of the share represented by the defendant so litigating.⁸⁰

The defendant who did not appear, and who did not receive

⁷³*Crossman v. Wyckoff*, 64 App. Div. 554, 72 N. Y. Supp. 337; *Chittenden v. Gates*, 25 App. Div. 623, 49 N. Y. Supp. 1133; *Tibbits v. Tibbits*, 7 Paige, 204.

⁷⁴*Weed v. Paine*, 31 Hun, 10, 13 Abb. N. C. 200; *Davis v. Davis*, 3 N. Y. S. R. 163; *Sprague v. Engelbrecht*, 29 Misc. 464, 61 N. Y. Supp. 952; *Walker v. Porter*, 49 N. Y. S. R. 849, 21 N. Y. Supp. 723; *Allen v. Allen*, 11 N. Y. S. R. 470; *Van Wyck v. Baker*, 11 Hun, 309.

⁷⁵*Hamersley v. Hamersley*, 7 N. Y. Legal Obs. 127.

⁷⁶*Tanner v. Niles*, 1 Barb. 560.

⁷⁷*Weston v. Stoddard*, 22 N. Y. Civ. Proc. Rep. 51, 42 N. Y. S. R. 76, 16 N. Y. Supp. 605.

⁷⁸*Wells v. Vanderwerker*, 45 App. Div. 155, 7 N. Y. Anno. Cas. 73, 60 N. Y. Supp. 1089.

⁷⁹*Defendorf v. Defendorf*, 42 App. Div. 167, 59 N. Y. Supp. 163; *Salls*

v. Salls, 28 Abb. N. C. 117, 19 N. Y. Supp. 246.

⁸⁰*Crossman v. Wyckoff*, 64 App. Div. 554, 72 N. Y. Supp. 337.

any part of the land partitioned, should not be charged with costs.⁸¹ Nor should a widow be charged with costs, because a sale must be made, and her dower extends to the entire property.⁸² In actual partition she is neither a necessary party, nor is she chargeable with costs.⁸³

The court cannot punish a defendant for unreasonably refusing to make a partition by deed, by imposing costs upon him.⁸⁴ The plaintiff will be allowed his costs, even though the defendant who purchases the property is entitled to a sum for improvements greater than his bid, and the purchaser will be required to pay the costs. The same result would, of course, be reached if the purchaser should be compelled to pay the amount of his bid to the referee, who would deduct the costs of the sale and the plaintiff's costs, and return the balance to the purchaser.⁸⁵

d. At what stage in the proceedings costs are allowed.—When there is no issue requiring a trial, it is the usual practice to wait for final judgment and the ascertainment of the amount of the proceeds of sale before determining what costs and allowances shall be granted.⁸⁶ But where an issue is raised it is one of the duties of the trial judge to determine upon whom should fall the burden of the unsuccessful contention, and he should decide that question at the trial.⁸⁷ Where the issues are sent to a referee for determination, the question of costs is determined by the court upon the confirmation of the referee's report. He has no power over the question of costs.⁸⁸ Where it is proposed to pay the mortgage upon the property, the mortgage must be paid before the costs of the partition action.⁸⁹

⁸¹*Tanner v. Niles*, 1 Barb. 560. *Saffron v. Saffron*, 11 N. Y. S. R.

⁸²*Tanner v. Niles*, 1 Barb. 560. 471.

⁸³*Tanner v. Niles*, 1 Barb. 560. ⁸⁷*Johnson v. Weir*, 36 Misc. 737, 74

⁸⁴*McGowan v. Morrow*, 3 N. Y. N. Y. Supp. 358.

Code Rep. 9. ⁸⁵*Wells v. Vanderwerker*, 45 App.

⁸⁶*Henderson v. Scott*, 43 Hun. 22; Div. 155, 7 N. Y. Anno. Cas. 73, 60

Ford v. Knapp, 102 N. Y. 135, 55 N. Y. Supp. 1089.

Am. Rep. 782, 6 N. E. 283; *Black v.* ⁸⁹*Beller v. Antisdel*, 84 Hun. 252,

O'Brien, 23 Hun. 82. 65 N. Y. S. R. 719, 32 N. Y. Supp.

⁸⁶*Flynn v. Kennedy*, 62 Hun. 26, 41 575.

N. Y. S. R. 359, 16 N. Y. Supp. 361;

c. Costs to guardian ad litem.—The costs of a guardian *ad litem* for infant defendants are allowed under the general equity power of the court.⁹⁰ The court has the power and authority, independently of the Code of Civil Procedure, to award reasonable compensation to a guardian *ad litem*.⁹¹

The costs of the guardian are payable out of the general fund, but anything in addition thereto must be made payable from the infant's share.⁹² The application of a mortgagee to be paid the amount of his mortgage out of the funds is a special proceeding, and not a motion in the action, and the costs of the application are governed by § 3240 of the Code of Civil Procedure.⁹³

But a motion to compel a referee to pay to a sheriff the amount of an execution that he has in his hands against a person entitled to share in the money in the referee's hands is a motion in the action, and not a special proceeding.⁹⁴

The question of additional allowances is discussed in § 299, subd. *h*, *post*.

130. Action to construe a will. *a. To whom costs are allowed.*—In an action for the construction of a will, costs are in the discretion of the court, and it may allow costs to all parties.⁹⁵ A person made a defendant in an action to construe a will has a right to come into court and protect his interest, and he, as well as the plaintiff will be allowed his costs, payable out of the estate, although the court decides that he has no interest in the estate.⁹⁶

b. Upon what principle costs are allowed.—Costs in such actions are allowed upon equitable principles. The fact that the

⁹⁰*Salls v. Salls*, 28 Abb. N. C. 117, 19 N. Y. Supp. 246.

⁹¹*Weed v. Paine*, 31 Hun. 10, 13 Abb. N. C. 200.

⁹²*New York Life Ins. & T. Co. v. Sands*, 26 Misc. 252, 56 N. Y. Supp. 741; *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85; *Gott v. Cook*, 7 Paige, 521.

⁹³*Byrnes v. Labagh*, 10 N. Y. S. R. 728, 12 N. Y. Civ. Proc. Rep. 417.

⁹⁴*Fowler v. Fowler*, 147 N. Y. 673, 42 N. E. 343.

⁹⁵*Leonard v. Davenport*, 58 How. Pr. 384.

⁹⁶*Miller v. Von Schwarzenstein*, 31 App. Div. 18, 64 N. Y. Supp. 475.

successful parties succeed against the avowed intention of the testator will have an important bearing in making the costs allowed to all parties a charge upon that part of the estate as to which the decedent died intestate, and which devolves upon the successful parties.⁹⁷ The defeated party can be allowed costs, but where he has been defeated at special term and at the appellate division, the court of appeals is averse to allowing him costs for his third defeat.⁹⁸

c. Amount of additional allowances.—Plaintiffs who act as trustees may be granted an allowance as a compensation for service of counsel in the litigation. This allowance is made by reason of the inherent power of the court and does not rest upon any statutory provision.⁹⁹ This allowance the court of appeals has the power to review.¹⁰⁰

The plaintiff may also receive an extra allowance as provided in § 3252 of the Code of Civil Procedure.

All parties to an action to construe a will may, where a defense has been interposed, receive an extra allowance under the provisions of § 3253 of the Code of Civil Procedure.¹⁰¹ This has been denied in a special term decision.¹⁰² But this was decided upon the authority of cases which were decided before an amendment to the Code of Procedure in 1870. Previous to that time an action to construe a will was expressly excepted from the provisions of § 309. In 1870 that exception was removed, and the limitation, that a defense must be interposed in an action, to bring it within the purview of that section was inserted. When our present Code was adopted, § 3253 took the place of § 309 of the former Code. The court in the case last cited evidently overlooked the change made in 1870.

⁹⁷*Booth v. Baptist Church of* 380; *Wetmore v. Parker*, 52 N. Y. Christ, 126 N. Y. 215, 28 N. E. 238. 466.

37 N. Y. S. R. 79.

¹⁰¹*Allen v. Stevens*, 161 N. Y. 123.

⁹⁸*McLean v. Freeman*, 70 N. Y. 81. 55 N. E. 568.

⁹⁹*Downing v. Marshall*, 37 N. Y.

380. ¹⁰²*Hafner v. Hafner*, 34 Misc. 99,

69 N. Y. Supp. 460.

¹⁰⁰*Downing v. Marshall*, 37 N. Y.

The allowances to the plaintiff or to two or more parties on the same side, made under § 3253 of the Code of Civil Procedure, cannot exceed the sum of \$2,000.¹⁰³ But where several legatees appear by different attorneys the allowances to the several defendants may exceed the sum of \$2,000.¹⁰⁴

d. By what court costs are awarded.—Costs, when awarded, are awarded by the supreme court in its discretion and within the limits imposed by law. This discretion the court of appeals has no power to review, unless the statutory limit has been exceeded.¹⁰⁵

e. Payable out of what fund.—Where the question affects the entire estate, costs should be made payable out of the entire estate.¹⁰⁶ But where only a portion of the will is involved, the costs of the plaintiff should be paid out of the entire estate, and the costs of the defendants should be made payable out of the shares coming to them.¹⁰⁷ But where the defendants are successful upon the questions involved, the court has a discretion whether it will allow them costs or not, but it cannot allow all the costs out of their property.¹⁰⁸ The costs are generally chargeable upon the residuary estate, rather than upon particular bequests. A guardian *ad litem* will be allowed his taxable costs out of the general estate, but any allowance in addition thereto must be made from the infant's share.¹⁰⁹

The plaintiff will be charged personally with costs and extra allowance, where the action is brought unnecessarily.¹¹⁰

131. Action to foreclose mechanic's lien. *a. In general.*—

¹⁰³ Code Civ. Proc. § 3254.

¹⁰⁸ *Mills v. Mills*, 50 App. Div. 221,

¹⁰⁴ *Allen v. Sterens*, 161 N. Y. 123. 63 N. Y. Supp. 771.

55 N. E. 568.

¹⁰⁹ *Smith v. Lansing*, 24 Misc. 566.

¹⁰⁵ *Prorost v. Prorost*, 70 N. Y. 53 N. Y. Supp. 633; *Doremus v. 141; Allen v. Sterens*, 161 N. Y. 123. *Doremus*, 66 Hun, 125, 20 N. Y. Supp. 906; *Hafner v. Hafner*, 34

¹⁰⁶ *Cook v. Munn*, 33 Hun, 25, 19

Misc. 99, 69 N. Y. Supp. 460.

N. Y. Week. Dig. 398; *Re Maresi*, 74

¹¹⁰ *Garlock v. Vanderort*, 128 N. Y.

App. Div. 76, 77 N. Y. Supp. 76.

374, 28 N. E. 599; *Smith v. Rocke-*

¹⁰⁷ *Cook v. Munn*, 33 Hun, 25, 19 N. Y. Week. Dig. 398.

jeller, 5 Thomp. & C. 562, 3 Hun, 295; *Wead v. Cantwell*, 36 Hun, 528.

Costs upon the foreclosure of mechanic's liens are now governed by the provisions of § 3411 of the Code of Civil Procedure, which contains practically the same provisions as the various laws which governed the question before the enactment of this section, except that now the law provides that the "costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party," while the law of 1885 provided that the "costs and disbursements . . . shall rest in the discretion of the court, and may be awarded to or against the plaintiff or the plaintiffs, defendant or defendants, or any or either of them, as may be just and equitable." Laws 1885, chap. 342, § 14. The costs upon foreclosure of a lien on a vessel are governed by §§ 3432 and 3439 of the Code of Civil Procedure. No costs will be allowed where the amount of the lien is paid before the service of the summons.¹¹¹

Under the former law, costs were allowed to the different defendants who succeeded in their contention.¹¹² Doubtless the court would do so now, under its general powers to award costs in equity cases.

It is no objection to allowing the plaintiff costs that he recovered less than he claimed, where no offer of judgment was made. The same rule will govern as in actions at law.¹¹³

b. Liability of the owner of the premises.—The payment of the amount of the claim into court does not necessarily relieve the owner from liability for costs.¹¹⁴ Such payment must be made by him to protect himself from costs, where he has money in his hands sufficient to pay the lien.¹¹⁵ If he defends the action and the plaintiff has judgment the owner will be obliged to pay costs.¹¹⁶

¹¹¹*Reynolds v. Hamil*, N. Y. Code Rep. N. S. 230. ¹¹⁴*Dunning v. Clark*, 2 E. D. Smith, 535.

¹¹²*McChesney v. Syracuse*, 75 Hun, 503, 57 N. Y. S. R. 676, 27 N. Y. Abb. Pr. 98. ¹¹⁵*Williamson v. Hendricks*, 10

Supp. 508. ¹¹⁶*Mull v. Jones*, 45 N. Y. S. R.

¹¹³*Valk v. McKeige*, 43 N. Y. S. R. 643, 18 N. Y. Supp. 359. 26, 16 N. Y. Supp. 741.

It has been held, however, that the omission to pay the money into court is not sufficient to charge the owner with costs created by the litigation between a contractor and a claimant.¹¹⁷

The neglect of a subcontractor to serve the notice provided for in § 423 of the Code of Civil Procedure will deprive him of costs against the owner, who defends the action, although the contractor makes default, and the lien is held valid against the property.¹¹⁸ The court may require the owner, where he defends the action, to pay costs in addition to the amount actually due the contractor.¹¹⁹

c. Offer of judgment.—The plaintiff will be obliged to pay costs to the owner subsequent to the offer of judgment, where the recovery is not as favorable as the offer; but he will be entitled to costs up to the time of the offer.¹²⁰

d. Costs allowed to a subcontractor.—A subcontractor is entitled to costs of his action, if there is enough due from the owners to the contractor to pay him. The costs of an appeal by the contractor from a judgment obtained by a subcontractor cannot be collected out of the property. The plaintiff should have demanded security upon the appeal, or else proceeded with his judgment.¹²¹ A subcontractor will be allowed his costs out of the fund, where the contractor has made a general assignment for the benefit of his creditors.¹²²

e. Additional allowance.—In actions that are difficult and extraordinary an additional allowance may be made under § 3253 of the Code of Civil Procedure.¹²³ Such an award rests

¹¹⁷*Eagleson v. Clark*, 2 E. D. Smith, 644, 2 Abb. Pr. 364.

¹¹⁸*Dunbar v. Diem*, 9 N. Y. Week. Dig. 231.

¹¹⁹*Kenney v. Appar*, 93 N. Y. 539.

¹²⁰*Schulte v. Lestershire Boot & Shoe Co.*, 88 Hun, 226, 34 N. Y. Supp. 663. See *Morgan v. Stevens*, 6 Abb. N. C. 356.

¹²¹*Holler v. Apa*, 47 N. Y. S. R. 485. 18 N. Y. Supp. 588.

¹²²*McMurray v. Hutcheson*, 59 How. Pr. 210.

¹²³*Morgan v. McKenzie*, 43 N. Y. S. R. 131, 17 N. Y. Supp. 174 (*Hagan v. American Baptist Home Missionary Soc.* 14 Daly, 131, 6 N. Y. S. R. 212, was decided as the law stood before 1885); *Lawson v. Reilly*, 13 N. Y. Civ. Proc. Rep. 290; *Carney v. Reilly*, 18 Misc. 11, 40 N. Y. Supp. 1123.

in the discretion of the court at trial term, and the final discretion rests with the same court, as it sits to hear appeals, either at general term or in the appellate division. From this determination within the limits of discretion there is no further appeal.¹²⁴ But the plaintiff is not entitled to the additional allowances provided for in § 3252 of the Code of Civil Procedure.¹²⁵

¹²⁴*Carney v. Reilly*, 18 Misc. 11, 40 N. Y. Supp. 1123; *Gorham v. Innis*, 115 N. Y. 87, 21 N. E. 722; *Hanover F. Ins. Co. v. Germania F. Ins. Co.* 138 N. Y. 252, 33 N. E. 1065. ¹²⁵*Wright v. Reusens*, 39 N. Y. S. R. 802, 15 N. Y. Supp. 504; *Ruth v. Jones*, 1 Month. L. Bull. 61; *Randolph v. Foster*, 3 E. D. Smith, 648. 4 Abb. Pr. 262.

CHAPTER XI.

INCREASED COSTS.

132. Double costs.

- a.* Who are entitled to double costs.
- b.* Waiver of right to double costs.
- c.* How obtained.
- d.* When they are refused.
- e.* Costs on appeals.

133. Treble costs.

132. Double costs. *a. Who are entitled to double costs.*—By § 3258 of the Code of Civil Procedure a public officer, appointed or elected, or a person assisting such an officer, when sued in an action at law¹ for an official act, is entitled, in case he is successful in his defense, to regular costs, and, in addition thereto, to one-half that amount. These are called double costs. Section 3259 of the Code of Civil Procedure expressly provides that the increase given by the preceding section shall not apply to disbursements. This section renders obsolete a class of cases which held that double costs included disbursements.²

The following officers have been held to be entitled to double costs: Overseer of the poor,³ sheriff,⁴ (after the adoption of the Code of Procedure the decisions were irreconcilable on the question whether a sheriff was entitled to double costs but there seems to be no room for question now), policemen,⁵ overseers of

¹*Cooper v. Schultz*, 33 How. Pr. 5; ³*Gallup v. Bell*, 20 Hun, 172.
Stewart v. Schultz, 33 How. Pr. 3, ⁴*Van Gelder v. Hallenbeck*, 15 N.
Affirmed in 34 How. Pr. 31, 50 Barb. Y. Civ. Proc. Rep. 333. 18 N. Y. S.
192, 3 Abb. Pr. N. S. 383; *Davis v.* R. 19, 2 N. Y. Supp. 252; *Smith v.*
Cooper, 50 Barb. 376. *Cooper*, 30 Hun. 395, 17 N. Y. Week.

²*Klinek v. Kelly*, 15 Abb. Pr. N. S. Dig. 490; *Shepard v. Hoit*, 7 Hill.
135; *Jackson v. Lynch*, 32 How. Pr. 198.
93; *Bartle v. Gilman*, 18 N. Y. 262. ⁵*Enright v. Shalvey*, 1 N. Y. City
264, 265; *Chadwick v. Brother*, 4 Ct. Rep. 58.
How. Pr. 284.

highway,⁶ and laborers working out their tax, when sued for trespass;⁷ collector of a school district;⁸ constable;⁹ surrogate;¹⁰ and trustees of a school district.¹¹ But a board of supervisors is not.¹²

b. Waiver of right to double costs.—This right to double costs is waived when the person otherwise entitled thereto unites in his answer with a person not entitled to such additional costs.¹³ A person who is interested in, or for whose benefit a process is being executed, is not within the meaning of the statute so as to be entitled to double costs, where he aids the officer in the execution of a process.¹⁴

The personal representatives of a deceased defendant who was entitled to double costs are also entitled to double costs.¹⁵

Indemnitors substituted as defendants in place of a sheriff under the provisions of §§ 1421–1426 of the Code of Civil Procedure are entitled to single costs in contradistinction to double costs, as provided in § 3258 of the Code of Civil Procedure.¹⁶

The contrary was held under the Revised Statutes.¹⁷

Where public officers have final judgment after return to a writ of alternative mandamus the costs allowed are the same as in an action, and they are entitled to double costs;¹⁸ but where the cost of the special proceeding are not the same as in an

⁶*Wheelock v. Hotchkiss*, 18 How. 296, Affirmed in 64 N. Y. 626; *Bradley v. Barter*, 8 How. Pr. 18; *Wales v. Hart*, 2 Cow. 426; *Merrill v. Near*, 5 Wend. 237; *Row v. Sherwood*, 6 Johns. 109.

⁷*Van Bergen v. Ackless*, 21 How. Pr. 314.

⁸*Reynolds v. Moore*, 9 Wend. 35. 24 Am. Dec. 116.

⁹*Jones v. Gray*, 13 Wend. 280; *Platt v. Sherry*, 7 Wend. 238.

¹⁰*Burhans v. Blanchard*, 1 Denio, 626.

¹¹*Saratoga & W. R. Co. v. McCoy*, 8 How. Pr. 526.

¹²*Barber v. Crossett*, 6 How. Pr. 45; *People ex rel. Lockport v. Niagara County*, 50 How. Pr. 353.

¹³Code Civ. Proc. § 5258; *Comins v. Jefferson County*, 3 Thomp. & C. Y. Supp. 254.

COSTS 11.

¹⁴*Bradley v. Fay*, 8 How. Pr. 18.

¹⁵*Carpentier v. Willet*, 3 Robt. 790. 28 How. Pr. 376.

¹⁶*Isaacs v. Cohen*, 86 Hun. 119, 2 N. Y. Anno. Cas. 98, 67 N. Y. S. R. 22, 33 N. Y. Supp. 188.

¹⁷*McFarland v. Crary*, 6 Wend. 297; *Westervelt v. Nelson*, 8 N. Y. Legal Obs. 173.

¹⁸*People ex rel. Bates v. Speed*, 73 Hun. 302, 57 N. Y. S. R. 295, 26 N. Y. Supp. 254.

action, as specified in § 3251 of the Code of Civil Procedure, double costs cannot be allowed to the officers who succeed. The costs of certiorari are regulated by § 3240 of the Code of Civil Procedure, and therefore officers who prevail in these proceedings are not entitled to double costs.¹⁹ Where an application for a peremptory writ of mandamus is denied without a previous alternative writ, the costs are governed by § 2086 of the Code of Civil Procedure, and therefore the successful officers would not be entitled to double costs.

c. How obtained.—By § 3248 of the Code of Civil Procedure “the judge presiding at the trial, or the referee, must, upon the application of the party to be benefited thereby, either before or after the verdict, report, or decision is rendered, make a certificate stating the fact. Such a certificate is the only competent evidence as to the matter before the taxing officer.” This section applies to actions, and not to special proceedings.²⁰ Such a certificate is conclusive upon the taxing officer,²¹ and may be made *autem pro tunc* even after appeal.²²

d. When they are refused.—The defendant is not entitled to double costs in an action brought to restrain a board of health from interfering with the plaintiff's business. Such an action is not brought for any act done by the defendant by virtue of his office, but to restrain him from doing what the plaintiff claimed he ought not to be allowed to do. The statute has no application to actions in equity.²³ The defendants in an action by a sheriff against the sureties upon the bond of an under sheriff for dam-

¹⁹*People ex rel. Sanders v. Colborne*, 20 How. Pr. 378; *People ex rel. Hall v. Hempstead Town Auditors*, 42 App. Div. 250, 59 N. Y. Supp. 10.

²⁰*Wood v. Randolph*, 9 Misc. 507, 61 N. Y. S. R. 80, 30 N. Y. Supp. 344.

²¹*Lillis v. O'Connor*, 8 Hun. 280; *Van Gelder v. Hallenbeck*, 15 N. Y. Civ. Proc. Rep. 333, 18 N. Y. S. R. 19, 2 N. Y. Supp. 252.

²²*Snyder v. Beyer*, 3 E. D. Smith, 235.

²³*Cooper v. Schultz*, 33 How. Pr. 5; *Stewart v. Schultz*, 33 How. Pr. 3, Affirmed in 50 Barb. 192, 34 How. Pr. 31, 3 Abb. Pr. N. S. 383; *Davis v. Cooper*, 50 Barb. 376; *Taaks v. Schmidt*, 25 How. Pr. 341.

ages for breach of the bond are not entitled to double costs, in case they are successful.²⁴

e. Costs on appeal.—Double costs on appeal under the former statute have been granted to the defendant when he was a respondent;²⁵ but he was denied them when he was appellant.²⁶ The Code of Civil Procedure has made no change in this respect.²⁷

It has been held by a later case that the defendant is entitled to double costs in all appeals from the county court to all higher courts, but he is not entitled to increased costs upon an appeal from a justice's court to the county court, because the costs in such cases are regulated solely by § 3073 of the Code of Civil Procedure.²⁸

Double costs cannot be obtained on a mere reversal which is not a final adjudication. The defendant must succeed upon the trial or obtain a final judgment in his favor before the right to double costs attaches; but when it once attaches by force of the statute, it applies to any appeal upon which he succeeds in sustaining the judgment originally rendered in his favor.²⁹

It is not necessary that double costs be awarded by the appellate court, when they are given by the statute.³⁰

133. Treble costs.—Section 14 of chapter 16 of the General Laws is as follows:

"Members of the militia ordered into the active service of the state by any proper authority shall not be liable, civilly or criminally, for any act or acts done by them while on duty. When a

²⁴*Conner v. Kccse*, 38 Hun, 124, 23 N. Y. Week. Dig. 478.

²⁵*Burkle v. Luce*, 1 N. Y. 239, 3 How. Pr. 236; *Porter v. Cobb*, 25 Hun, 184.

²⁶*Wheelock v. Hotchkiss*, 18 How. Pr. 468; *Dockstader v. Sammons*, 4 Hill, 546; *Foster v. Cleveland*, 6 How. Pr. 253; *Estus v. Baldwin*, 9 How. Pr. 80; *Bartle v. Gilman*, 18 N. Y. 260, 17 How. Pr. 1.

²⁷*Scott v. Farley*, 3 Month. L. Bull. 29.

²⁸*Shaver v. Eldred*, 86 Hun, 51, 66 N. Y. S. R. 783, 33 N. Y. Supp. 158; *Wood v. Randolph*, 9 Misc. 507, 61 N. Y. S. R. 80, 30 N. Y. Supp. 344. ²⁹*Heimers v. Davidson*, 2 N. Y. City Ct. Rep. 308.

³⁰*Carpentier v. Willet*, 3 Robt. 700, 28 How. Pr. 376.

suit or proceeding shall be commenced in any court by any person against any officer of the militia for any act done by such officer in his official capacity in the discharge of any duty under this chapter, or against any person acting under the authority or order of any such officer, or by virtue of any warrant issued by him pursuant to law, the defendant may require the person prosecuting or instituting the suit or proceeding to file security for the payment of costs that may be awarded to the defendant therein; and the defendant in all cases may make a general denial and give the special matter in evidence. In case the plaintiff shall be nonsuited, or have a verdict or judgment rendered against him, the defendant shall recover treble costs."

Where a constable executes a warrant for military fines, issued to him by the colonel of a regiment, he acts under the command of an officer of the militia, and if prosecuted therefor, he is entitled to treble costs if he succeeds. The words "treble costs" are to be understood literally.³¹

Where the supreme court reverses a judgment of a court martial on the ground that the court martial never obtained jurisdiction, costs are properly imposed upon the officer assuming to hold the court martial.³²

The provision of § 14 of chapter 16 of the General Laws, requiring security for costs in actions brought against any officer of the militia for any act done by him in his official capacity, is constitutional.³³

³¹*Walker v. Burnham*, 7 How. Pr. 55.

³³*McLaughlin v. Kipp*, 82 App. Div. 413, 81 N. Y. Supp. 896.

³²*Re Leary*, 30 Hun, 394.

CHAPTER XII.

COSTS IN ACTIONS AGAINST SCHOOL OFFICERS AND MUNICIPAL CORPORATIONS.

134. Costs in actions against school officers.
- a. Statute.
 - b. Who is entitled to protection of the statute.
 - c. Certificate.
 - d. How costs awarded against a school officer are collected.
 - e. Costs awarded to school officers.
135. Costs in actions against a municipal corporation.
- a. In general.
 - b. What actions are within the statute.
 - c. To whom the claim must be presented.
 - d. How the claim must be presented.
 - e. Effect of the presentation of the claim.

134. Costs in actions against school officers. a. *Statute.* —

Section 3244 of the Code of Civil Procedure is as follows:

“Costs cannot be awarded to the plaintiff in an action against a school officer, or a supervisor, on account of an act performed by him by virtue of, or under color of, his office, or on account of a refusal or an omission to perform a duty enjoined upon him by law, where his act, refusal, or omission might have been the subject of an appeal to the state superintendent of public instruction, and where it is certified that it appeared upon the trial that the defendant acted in good faith. But this section does not apply to an action for a penalty; or to an action or a special proceeding to enforce a decision of the superintendent.”

Section 3 of Article 1, of Title 15 of Chapter 23 of the General Laws is a substantial re-enactment of the foregoing section.

Section 4 of the same Article, Title, and Chapter provides that “whenever the trustees of any school district, or any school district officer or officers, have been or shall be instructed by a

resolution of the district, at a meeting called for that purpose, to defend any action brought against them, or to bring or defend an action or proceeding touching any district property or claim of the district, or involving its rights or interests, or to continue any such action of (or) defense, all their costs and reasonable expenses, as well as all costs and damages adjudged against them, shall be a district charge and shall be levied by tax. If the amount claimed by them be disputed by a district meeting, it shall be adjusted by the county judge of any county in which the district or any part of it is situated."

Section 5 is as follows: "Whenever such trustees or any school district officer shall have brought or defended any such action or proceeding, without any such resolution of the district meeting, and after the final determination of such suit or proceeding, shall present to any regular meeting of the inhabitants of the district, an account, in writing, of all costs, charges, and expenses paid by him or them, with the items thereof, and verified by his or their oath or affirmation, and a majority of the voters at such meeting shall so direct, it shall be the duty of the trustees to cause the same to be assessed upon and collected of the taxable property of said district, in the same manner as other taxes are by law assessed and collected; and, when so collected, the same shall be paid over, by an order upon the collector or treasurer to the officer or officers entitled to receive the same; but this provision shall not extend to suits for penalties, nor to suits or proceedings to enforce the decisions of the superintendent of public instruction."

Section 6. "Whenever an officer or officers mentioned in the last preceding section of this title shall have complied with the provisions of said section, and the inhabitants shall have refused to direct the trustees to levy a tax for the payment of the costs, charges, and expenses therein mentioned, it shall be lawful for him or them, then and there, to give notice orally and publicly,

that he will appeal to the county judge of the county, and in case of his disability to act in the matter by reason of being disqualified, or otherwise, then to the district attorney of the county in which the schoolhouse of said district is located, from the refusal of said meeting to vote a tax for the payment of said claim, and the inhabitants may, then and there, or at any subsequent district meeting, appoint one or more of the inhabitants of the district to protect the rights and interests of the district upon said appeal. And the officer or officers before mentioned shall thereupon, within ten days, serve upon the clerk of said district (or if there be no such clerk, upon the town clerk of the town) a copy of the aforesaid account, so sworn to, together with a notice, in writing, that on a certain day therein specified he or they intend to present such account to the county judge or to the district attorney, as the case may be, for settlement. And the clerk shall record such notice together with a copy of the account, and the same shall be subject to the inspection of the inhabitants of the district. And it shall be the duty of the person or persons appointed by any district meeting for that purpose, to appear before the county judge or the district attorney, as the case may be, on the day mentioned in the notice aforesaid, and to protect the rights of the district upon such settlement; and the expenses incurred in the performance of this duty shall be a charge upon said district, and the trustees, upon presentation of the account of such expenses, with the proper voucher therefor, may levy a tax therefor, or add the same to any other tax to be levied by them; and their refusal to levy said tax for the payment of said expenses, shall be subject to an appeal to the superintendent of public instruction."

Section 7. "Upon the appearance of the parties, or upon due proof of service of the notice and copy of the account, the county judge shall examine into the matter and hear the proofs and allegations presented by the parties, and decide by order whether

or not the account, or any or what portion thereof, ought justly be charged upon the district, with costs and disbursements to such officer or officers, in his discretion, which costs and disbursements shall not exceed the sum of \$30, and the decision of the county judge shall be final; but no portion of such account shall be so ordered to be paid which shall appear to such judge to have arisen from the wilful neglect or misconduct of the claimant. The account with the oath of the party claiming the same shall be *prima facie* evidence of the correctness thereof. The county judge may adjourn the hearing from time to time, as justice shall seem to require."

Section 8. "It shall be the duty of the trustees of any school district, within thirty days after service of a copy of such order upon them, or upon the district clerk, and notice thereof to them, or any two of them, to cause the same to be entered at length in the book of record of said district, and to raise the amount thereby directed to be paid, by a tax upon the district, to be by them assessed and levied in the same manner as a tax voted by the district."

b. Who is entitled to protection of the statute.—The plaintiff is not entitled to costs, where he recovers a judgment against a school collector for trespass, in seizing and selling property without legal notice.¹ The exemption applies to costs on appeal, as well as costs in the trial court.² It is not evidence of bad faith for the defendant to accept the office of trustee, and levy a tax as directed by law, after the county superintendent had attempted to change the boundaries of adjoining districts, and the plaintiff had stated that he intended to contest the legality of the new organization. The defendant has as much right to his opinion as the plaintiff has to his.³

A supervisor who does not honor a draft drawn upon him by

¹*Whitbeck v. Billings*, 3 Thomp. & C. 764, 1 Hun. 494; *Clarke v. Tunnicliff*, 38 N. Y. 58.

²*Ex parte Bennett*, 3 Denio, 175.

³*Rawson v. Van Riper*, 1 Thomp. & C. 370.

a trustee *de facto* is liable for costs, and is not entitled to a certificate because payment to a *de facto* officer would have protected him.⁴ A tax collector who refuses to pay an order drawn on him by the trustee to pay the wages of a teacher is not entitled to a certificate under § 3244 of the Code of Civil Procedure, because an appeal does not lie from that refusal to the state superintendent.⁵ Where a school officer makes a levy, and a person feels aggrieved, he should appeal to the superintendent of public instruction; otherwise if he obtains a judgment and the judge certifies that the defendant acted in good faith, the plaintiff will be denied costs.⁶

c. Certificate.—School officers are entitled to the protection of this section, upon receiving a certificate that they acted in good faith.⁷ But one certificate is necessary, and that protects the defendant through all stages of the litigation. There is no provision for a certificate that the defendant acted in bad faith.⁸ A certificate that it did not appear that the defendant acted in good faith does not exonerate the defendant from paying costs, as that is not equivalent to a certificate that he acted in good faith.⁹ The question of costs is decided by the nature of the action, and not by the certificate. The granting of a certificate in an action not provided for by the Code of Civil Procedure will not exempt the defendant from the payment of costs.¹⁰

d. How costs awarded against a school officer are collected.—When costs are awarded against a school officer they are to be collected by execution from him individually. A mandamus will

⁴*Barrett v. Sayer*, 34 N. Y. S. R. *Johnson v. Ycomans*, 8 How. Pr. 325, 12 N. Y. Supp. 170.

⁵*Durfee v. McCall*, 21 N. Y. Week. Dig. 337. *Fenno v. Dickinson*, 4 Denio, 84; *Ayers v. Western R. Corp.* 49 N. Y.

⁶*Clarke v. Tunnicliff*, 38 N. Y. 58, 4 Abb. Pr. N. S. 451. 660; *Broekway v. Jewett*, 16 Barb. 590.

⁷*Clarke v. Tunnicliff*, 38 N. Y. 58, 4 Abb. Pr. N. S. 451. ⁸*Budd v. Allen*, 69 Hun, 535, 53 N. Y. S. R. 290, 24 N. Y. Supp. 5.

⁹*Willey v. Sharer*, 1 Thomp. & C. 324; *Ex parte Bennett*, 3 Denio, 175; ¹⁰*Durfee v. McCall*, 21 N. Y. Week. Dig. 337.

not lie to compel him to pay the costs out of the money in his hands belonging to the school district.¹¹

Where the trustees of a school district, without the authority of the district, commence an action to recover a school tax, and they are defeated with costs, the plaintiff can collect his costs only from the individual property of the trustees. In such a case the trustees have no claim against the school district for the repayment of the costs which they have been compelled to pay, until such claim has been audited and allowed as provided by statute.^{11a} If new trustees are elected pending the action, and they prosecute and take charge of the litigation, they are personally liable for the entire costs of the action, although they have never been formally substituted as plaintiffs therein.^{11b}

e. Costs awarded to school officers.—Officers of a school district are entitled to double costs when they succeed in their defense in an action brought against them for an act done by them by virtue of their office.¹²

135. Costs in actions against a municipal corporation. *a. In general.*—Under Code Civ. Proc. § 3245, costs cannot be awarded to the plaintiff in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only, unless the claim on which the action is founded was, before the commencement of the action, presented to the board of such corporation having the power to audit the same, or to its chief fiscal officer, at least ten days before the commencement of said action.

b. What actions are within the statute.—This section does not apply to actions *ex delicto*,—only to actions *ex contractu*.¹³

¹¹*People ex rel. Wallace v. Abbott*, 107 N. Y. 225, 13 N. Y. Civ. Proc. Rep. 163, 27 N. Y. Week. Dig. 276. ^{11b}*Beck v. Kerr*, 87 App. Div. 1, 83 N. Y. Supp. 1057.

¹²Code Civ. Proc. § 3258; *Reynolds v. Moore*, 9 Wend. 35, 24 Am. Dec. 116; *Saratoga & W. R. Co. v. McCoy*,

^{11a}*People ex rel. Wallace v. Abbott*, 107 N. Y. 225, 13 N. E. 779; *Beck v. Kerr*, 87 App. Div. 1, 83 N. Y. Supp. 1057. 8 How. Pr. 526; *Barber v. Crossett*, 6 How. Pr. 45, Code Rep. N. S. 401. ¹³*Gage v. Hornellsville*, 106 N. Y.

There were several cases at general term which held otherwise, but they have been overruled by the court of appeals in the cases last cited.¹⁴ This section does not apply to claims to be relieved from assessment,¹⁵ nor to costs on appeal.¹⁶ A claim for damages for property destroyed by a mob need not be presented before suit, in order to entitle the plaintiff to costs.¹⁷

This section does not apply to actions brought in a justice's court, because subdivision 13 of § 3347 says that § 3245 applies only to those actions specified in subdivision 4 of § 3347, which does not include actions brought in justice's court.¹⁸

c. To whom the claim must be presented.—By the amendment of 1899 a provision was added that the claim should be presented "to the board of such corporation having the power to audit the same." Before that the claim must have been presented "to its chief fiscal officer."

Before that amendment it was held that a presentation to the treasurer complied with the requirements of this section.¹⁹ It was held that a presentation to the common council of a city,²⁰ especially where the charter so provides,²¹ or to the trustees of a village, was sufficient.²²

667, 8 N. Y. S. R. 885, 27 N. Y. ¹⁴*McClure v. Niagara County*, 3 Week. Dig. 8, 12 N. E. 817; *Hunt v. Abb. App. Dec. 83, 4 Abb. Pr. N. S. Oswego*, 107 N. Y. 629, 1 Silv. Ct. 202, 4 Trans. App. 275.

App. 275; 27 N. Y. Week. Dig. 237, ¹⁵*Marsh v. Lansingburgh*, 31 Hun. 11 N. Y. S. R. 762, 14 N. E. 97; *Taylor v. Cohoes*, 105 N. Y. 54, 26 N. Y. 514.

¹⁶*Baine v. Rochester*, 85 N. Y. 525, Week. Dig. 60, 6 N. Y. S. R. 461, 11 12 N. Y. Week. Dig. 419; *Fisher v. N. E. 282*; *Childs v. West Troy*, 11 Cortland, 42 Hun, 173; *Judson v. N. Y. Week. Dig. 193*; *McClure v. Olean*, 40 Hun, 158; *Dressel v. Niagara County*, 3 Abb. App. Dec. Kingston, 32 Hun, 526; *Hunt v. Oswego*, 45 Hun, 305.

83, 4 Abb. Pr. N. S. 202, 4 Trans. ¹⁷*Williams v. Buffalo*, 25 Hun, 301, App. 275; *Howell v. Buffalo*, 15 N. 13 N. Y. Week. Dig. 142; *Butler v. Y. 512*; *McGaffin v. Cohoes*, 74 N. Y. Rochester, 4 Hun, 321, 6 Thomp. & 387, 30 Am. Rep. 307.

¹⁸*Hart v. Brooklyn*, 36 Barb. 226; C. 572.

Dressel v. Kingston, 32 Hun, 526; ¹⁹*Grier v. Lockport*, 21 N. Y. Week. Dig. 444; *Quinlan v. Utica*, 11 Hun, 217, Affirmed in 74 N. Y. 603.

²⁰*Re Jetter*, 78 N. Y. 601.

²¹*Utica Waterworks Co. v. Utica*, ²²*Gage v. Hornellsville*, 41 Hun, 87, 31 Hun, 426. 2 N. Y. S. R. 345, Affirmed in 106

Since the amendment a presentation to either the treasurer of a city or its common council, or to the treasurer of a village, or its board of trustees, would be sufficient.²³

A claim against the water commissioners of a village should be presented to the treasurer of the village, and not to the treasurer of the water commissioners.²⁴

A claim against a town is properly presented to the supervisor.²⁵

d. How the claim must be presented.—The claim must be presented by the claimant, or someone who claims authority to act for him, and in such a form as will afford an opportunity and sufficient information, so that, when presented to the proper auditing officers, it may be audited and paid.²⁶

e. Effect of the presentation of the claim.—If the claim is properly presented and rejected, and the plaintiff succeeds in an action thereon, he is entitled to costs; but if the claim was not presented, neither party is entitled to costs when the plaintiff succeeds.²⁷

The question as to whether the claim had been properly presented would not arise upon the trial, and no certificate of the court is required,²⁸ but should be presented in the first instance to the taxing officer. His decision can be reviewed only by a motion for that purpose. It cannot be raised on an appeal from the judgment.²⁹

A claim presented for \$10,000 damages is properly presented, although only \$5,000 damages is asked in the action brought upon the claim.³⁰

N. Y. 667, 27 N. Y. Week. Dig. 8, 8
N. Y. S. R. 885, 12 N. E. 817.

²³*Brester v. Hornellsville*, 35 App.
Div. 626, 88 N. Y. S. R. 915, 54 N.
Y. Supp. 915.

²⁴*King v. Randolph*, 28 App. Div.
25, 50 N. Y. Supp. 902. *Contra*,
Hallinan v. Ft. Edward, 26 Misc.
122, 57 N. Y. Supp. 162.

²⁵*Stanton v. Taylor*, 64 Hun, 633,
45 N. Y. S. R. 906, 19 N. Y. Supp.
43.

²⁶*Spaulding v. Waverly*, 12 App.
Div. 594, 44 N. Y. Supp. 112.

²⁷*Baine v. Rochester*, 85 N. Y. 523.

²⁸*Baine v. Rochester*, 85 N. Y. 523.

²⁹*Stanton v. Taylor*, 64 Hun, 633,
45 N. Y. S. R. 906, 19 N. Y. Supp.

43.
³⁰*Minick v. Troy*, 19 Hun, 253, Af-
firmed in 83 N. Y. 514.

CHAPTER XIII.

MATRIMONIAL ACTIONS.

136. Action for absolute divorce.

- a.* Costs.
- b.* Counsel fees allowed.
 - (1) In general.
 - (2) Poverty of husband.
- c.* Counsel fees refused.
- d.* Reviewed by court of appeals.
- e.* Counsel fees upon appeal.
- f.* Rights of the attorney upon a settlement.
- g.* How the payment of counsel fees may be enforced.

137. Action for separation.

- a.* In general.
- b.* Counsel fees denied.
- c.* Counsel fees upon appeal.
- d.* Rights of the attorney upon a settlement.
- e.* How the payment of counsel fees may be enforced.

138. Action to annul a marriage.

- a.* Counsel fees allowed.
- b.* Counsel fees denied.

139. Costs in other actions between husband and wife.

136. Action for absolute divorce. *a. Costs.*—Costs in these actions are in the discretion of the court, under § 3230 of the Code of Civil Procedure. When allowed they are only the regular taxable costs. Costs are not allowed against a wife when she is a defendant, unless it appears that she has property.¹ By the consent of the husband or his attorney the question of allowance and counsel fees may be reserved till the trial of the action. Without that consent the court can, upon the entry of a final judgment in favor of the wife, allow only taxable costs.² There

¹*De Rose v. De Rose*, Hopk. Ch. Div. 224, 58 N. Y. Supp. 532; *Bentley v. Bentley*, 3 Month. L. Bull. 76;

²*Lonsdale v. Lonsdale*, 41 App. *Atherton v. Atherton*, 82 Hun, 179.

is no authority for making an award of an additional allowance.³ Where a referee hears the case, he has the same power over the allowance of costs as in any other action, and the special term has no power to change his decision on that point. Where a judgment contains a finding as to costs not warranted by the referee's report, the remedy is by a motion to strike out the part that is objectionable.⁴

Costs will be denied the successful party where there is reason to believe that he, as well as the defeated party, obtained false testimony.⁵ The report of a referee is not a special verdict, and costs, as such, cannot be taxed on motion for judgment.⁶ A co-respondent who appears and serves an answer and defends an action is properly chargeable with costs, if his defense fails. He is not called a defendant by the amendment to § 1757 of the Code of Civil Procedure (Laws of 1899, chap. 661). He is not obliged to defend, and cannot be compelled to do so, but if he elects to do so, he should be treated as a party defendant from the time of his appearance. Costs are in the discretion of the court, but § 1757 of the Code of Civil Procedure modifies this, in that, if the co-respondent is successful, he is entitled, as of right, to costs against the person naming him as co-respondent.⁷

b. Counsel fees allowed. (1) *In general.*—Courts have a right to grant counsel fees in matrimonial actions as incidental to the power vested in the court to try such actions, and no statutory authority is necessary.⁸ Counsel fees are never al-

64 N. Y. S. R. 798, 31 Supp. 977; *Sparrowhawk v. Sparrowhawk*, 11 Beadleston v. Beadleston, 103 N. Y. Hun, 528.

403, 8 N. E. 735; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550; *Billings v. Billings*, 73 App. Div. 69, 76 N. Y. Supp. 628.

De Meli v. De Meli, 5 N. Y. Civ. Proc. Rep. 306, 67 How. Pr. 20. *Higgins v. Sharp*, 164 N. Y. 4, 58 N. E. 9; *North v. North*, 1 Barb. Ch.

Beadleston v. Beadleston, 103 N. Y. 402, 8 N. E. 735; *Pountney v. Pountney*, 32 N. Y. S. R. 334, 10 N. Y. Supp. 192. *Griffin v. Griffin*, 47 N. Y. 134; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *O'Dea v. O'Dea*, 31 Hun, 441, Affirmed in 101 N. Y. 23, 4 N. E. 110.

Sabater v. Sabater, 7 App. Div. 70, 39 N. Y. Supp. 958.

Beadleston v. Beadleston, 20 N. Y. S. R. 21, 2 N. Y. Supp. 809.

lowed for past services, but for services to be rendered.⁹ Counsel fees will be denied when the husband discontinues his action against his wife for divorce,¹⁰ or the wife abandons her defense to her husband's action.¹¹ They will also be denied where, between the time of the service of the notice of motion and the hearing thereon, the case has been tried and judgment entered.¹²

Counsel fees will be allowed the wife where she denies under oath the charges of adultery,¹³ or sets up an affirmative defense, such as recrimination.¹⁴ But the countercharges must be alleged specifically, and not in general terms.¹⁵ Or if she admits the charge and sets up the affirmative defense of forgiveness.¹⁶ She will also be allowed counsel fees when she is the plaintiff, where, if the allegations of her complaint are true, she is entitled to a divorce.¹⁷

(2) *Poverty of husband.*—The poverty of the husband is no answer to such an application, when he is the plaintiff, although that may be taken into consideration in fixing the amount. He must conform to the rule or abandon the suit.¹⁸ But that reason

⁹*McCarthy v. McCarthy*, 137 N. Y. N. Y. Supp. 800; *Bucki v. Bucki*, 70 500, 33 N. E. 550, 51 N. Y. S. R. Hun. 598, 54 N. Y. S. R. 287, 24 N. 276; *Winkemeier v. Winkemeier*, 11 Y. Supp. 374.

App. Div. 201, 42 N. Y. Supp. 583; ¹⁴*Strong v. Strong*, 1 Abb. Fr. N. *Beadleston v. Beadleston*, 103 N. Y. S. 358, 3 Robt. 675; *Shaw v. Shaw*, 402, 25 N. Y. Week. Dig. 8, 3 N. Y. 5 Misc. 497, 26 N. Y. Supp. 715; S. R. 634, 8 N. E. 735; *Poillon v. Miller v. Miller*, 43 How. Pr. 125; *Poillon*, 75 App. Div. 536, 78 N. Y. *Starkweather v. Starkweather*, 29 Supp. 323; *Emerson v. Emerson*, 26 Hun. 488.

N. Y. Supp. 292. The contrary was held before the adoption of the Code of Civil Procedure. ¹⁵*Clark v. Clark*, 7 Robt. 284.

¹⁶*Starkweather v. Starkweather*, 29 Hun. 488; *Frickel v. Frickel*, 4 Misc. 382, 24 N. Y. Supp. 483. ¹⁷*Bucki v. Bucki*, 70 Hun. 598, 54 N. Y. S. R. 287, 24 N. Y. Supp. 374; *Douglas v. Douglas*, 13 Abb. Pr. N. S. 291; *Bertschy v. Bertschy*, 14 N. Y. Week. Dig. 111; *Browne v. Browne*, 9 N. Y. Civ. Proc. Rep. 189; *Brennan v. Brennan*, 19 N. Y. Week. Dig. 342.

¹⁸*Goldschmidt v. Goldschmidt*, 1 Month. L. Bull. 74.

¹²*Winkemeier v. Winkemeier*, 11 App. Div. 199, 42 N. Y. Supp. 586.

¹³*Frickel v. Frickel*, 4 Misc. 382.

24 N. Y. Supp. 483; *Strong v. Strong*, 1 Abb. Pr. N. S. 358, 3 Robt. 675; *Israel v. Israel*, 28 Misc. 57, 59

¹⁵*Frickel v. Frickel*, 4 Misc. 382, 24 N. Y. Supp. 483; *Hallock v. Hallock*, 4 How. Pr. 160; *Purcell v. Purcell*, 3 Edw. Ch. 194; *Cohen v.*

does not apply where the wife is the plaintiff and is able to conduct the action.¹⁹ Where the husband has paid a sum in gross in full for services of the attorney in an action, upon a disagreement by the jury the attorney may move for additional counsel fees, because the possibility of a disagreement was not within the thought of the parties.²⁰ Before counsel fees will be allowed in an action brought by the wife, she must present proof to the court showing a probable, and certainly a possible, prospect of establishing her marriage to the defendant.²¹

c. Counsel fees refused.—Counsel fees will be refused where it appears clearly beyond reasonable doubt, that the success of the husband is inevitable;²² or where the wife does not deny under oath the charge of adultery;²³ or if she denies the adultery she does not deny acts that are incompatible with her innocence;²⁴ or where she admits the acts charged, but seeks to justify them under a divorce not recognized by the courts of this state;²⁵ or where the wife is the plaintiff and all her allegations of her husband's adultery are upon information and belief, and no proofs of the source of her information or the grounds of her belief are presented to the court;²⁶ or where the wife has property of her own²⁷ and has induced the act complained of,²⁸ or does not explain suspicious circumstances.²⁹

They should never be granted to punish the husband because

Cohen, 11 Misc. 704, 1 N. Y. Anno. Cas. 226, 66 N. Y. S. R. 336, 32 N. Y. Supp. 1082. 4 Misc. 382, 24 N. Y. Supp. 483. ²⁴*Pettee v. Pettee*, 45 N. Y. S. R. 549, 19 N. Y. Supp. 311.

¹⁹*Hoffman v. Hoffman*, 7 Robt. 474. ²⁵*Baillie v. Baillie*, 30 App. Div. 461, 52 N. Y. Supp. 228. ²⁶*Downing v. Downing*, 23 App. Div. 559, 48 N. Y. Supp. 727; *Monk v. Monk*, 7 Robt. 153; *Osgood v. Osgood*, 2 Paige, 621; *Moriarty v. Moriarty*, 26 Jones & S. 279, 10 N. Y. Supp. 228.

²¹*Collins v. Collins*, 71 N. Y. 269, 9 N. Y. Week. Dig. 131, 573. ²⁷*Chase v. Chase*, 29 Hun. 527.

²²*Uhlman v. Uhlman*, 19 Jones & S. 361; *Desbrough v. Desbrough*, 29 Hun. 592; *Kock v. Kock*, 42 Barb. 515; *Cohen v. Cohen*, 11 Misc. 704, 1 N. Y. Anno. Cas. 226, 66 N. Y. S. R. 336, 32 N. Y. Supp. 1082. ²⁸*Ober v. Ober*, 5 Silv. Sup. Ct. 37, 7 N. Y. Supp. 843. ²⁹*Morrell v. Morrell*, 2 Barb. 480.

²³*Miller v. Miller*, 27 Misc. 758, 59 N. Y. Supp. 473; *Frickel v. Frickel*,

he does not consent to a reference.³⁰ The court has a right to require the husband to pay a sum to be used for a specific purpose, such as to pay referee's fees.³¹

d. Reviewed by court of appeals.—The allowance of counsel fees is discretionary with the court of original jurisdiction, and the court of appeals will not review such an order unless the amount is so excessive as to show abuse of judicial discretion.³²

e. Counsel fees upon appeal.—Where a wife has obtained a judgment in her favor, and the husband appeals, the court has still power to grant her alimony and counsel fees in defending the judgment.³³ If it should appear upon such application that, in previously carrying on her action, she had incurred expenses the payment of which was essential in order that she might further maintain her rights under the judgment, the past expense could also be included in the allowance to her.³⁴ But the court may refuse to include the past expense of attorneys, and assign other attorneys to defend her.³⁵ An allowance will be made for counsel fees upon an appeal by the wife from a judgment against her, where it appears that the appeal is taken in good faith and upon reasonable cause.³⁶

The court is reluctant to grant counsel fees upon an appeal by a wife from a judgment in her favor, and upon such an application she must present a meritorious reason for such an appeal.³⁷ A wife cannot move for alimony and counsel fees upon a reversal of a judgment against her, until the order of reversal is entered.³⁸

³⁰*Patterson v. Patterson*, 4 App. Div. 146, 74 N. Y. S. R. 502, 38 N. Y. Supp. 637. ³⁴*McCarthy v. McCarthy*, 137 N. Y. 500, 51 N. Y. S. R. 276, 33 N. E. 550.

³¹*Schloemer v. Schloemer*, 49 N. Y. 82. ³⁵*Emerson v. Emerson*, 26 N. Y. Supp. 292.

³²*De Llamosas v. De Llamosas*, 62 N. Y. 618. ³⁶*Halstead v. Halstead*, 11 Misc. 592, 1 N. Y. Anno. Cas. 230, 66 N. Y. S. R. 335, 32 N. Y. Supp. 1080;

³³*McBride v. McBride*, 119 N. Y. 519, 30 N. Y. S. R. 78, 23 N. E. 1065; *Gansz v. Gansz*, 59 N. Y. Supp. 955.

Donnelly v. Donnelly, 63 How. Pr. 481. ³⁷*Winkemeier v. Winkemeier*, 11 App. Div. 201, 42 N. Y. Supp. 583.

³⁸*Halstead v. Halstead*, 21 App. Div. 589, 47 N. Y. Supp. 814.

f. Rights of the attorney upon a settlement.—(See § 137, subd. *d*, *infra*.) There seems to be no reason why a husband is not liable for the services of his wife's attorney in an action for a divorce, where the action has been settled, the same as in an action for separation. The cases that hold otherwise are doubtless overruled.³⁹

If a settlement takes place after an allowance of counsel fees to the attorney for the wife, a proper reduction will be made, as the original order contemplated services which will not be rendered.⁴⁰ If the settlement is made before the motion for counsel fees is heard, an allowance should be made, and if the order granting the allowance is set aside the attorney can appeal therefrom, though he is not a party to the action.⁴¹

g. How the payment of counsel fees may be enforced.—(See § 137, subd. *e*, *infra*.) The costs awarded in the final judgment cannot be collected by proceedings to punish for contempt. *Jacquin v. Jacquin*, 36 Hun, 378, is not in conflict with *Park v. Park*, 80 N. Y. 156, as in the latter case the costs for which the attachment was issued were costs of the proceeding for attachment.⁴² Section 1773 of the Code of Civil Procedure requires that it must appear presumptively to the satisfaction of the court that payment cannot be enforced by means of resorting to any security given, or by sequestration proceedings, or by issuing execution.⁴³ Counsel fees awarded in a final judgment upon default may not be enforced by contempt proceedings.⁴⁴ But counsel fees ordered to be paid *pendente lite* may be enforced by contempt proceedings.⁴⁵ Although there is a provision that the

³⁹*Phillips v. Simmons*, 20 How. Pr. 342, 11 Abb. Pr. 287. *fair v. Cockefair*, 23 Abb. N. C. 219, 7 N. Y. Supp. 170.

⁴⁰*Rudd v. Rudd*, 28 N. Y. Week. Dig. 229, 13 N. Y. S. R. 904. *Cockefair v. Cockefair*, 23 Abb. N. C. 219, 7 N. Y. Supp. 170.

⁴¹*London v. London*, 17 N. Y. Week. Dig. 477. *Miller v. Miller*, 7 Hun, 208. *Contra, Pritchard v. Pritchard*, 4

⁴²*Lansing v. Lansing*, 4 Lans. 377; *Abb. N. C. 298; Howe v. Howe*, 5 N. Branth v. Branth, 20 N. Y. Civ. Y. Week. Dig. 460.

Proc. Rep. 33, 36 N. Y. S. R. 628, 13 N. Y. Supp. 360. *Mercer v. Mercer*, 73 Hun, 192, 56 N. Y. S. R. 117, 25 N. Y. Supp.

amount be included in the judgment. A provision for the collection of counsel fees for past services should not be included in the judgment.⁴⁶

When the action terminates, either by settlement or death, all intermediate orders fall. After such termination of the action counsel fees cannot be collected by the attorney against the husband by an order⁴⁷ nor by action.⁴⁸

The order committing the husband for contempt must contain an adjudication that he has refused to pay the counsel fees ordered by the court, and that such refusal was calculated to, and did actually, defeat, impair, or prejudice the rights of the party in whose favor they had been ordered. It must also appear that payment cannot be enforced by execution, sequestration, or resorting to any security.⁴⁹ The pleading of the husband may be stricken out on his failure to pay counsel fees.⁵⁰ Where the wife fails in her proceeding to enforce the collection of alimony and counsel fees, because the order does not contain recitals, costs should not be imposed on her.⁵¹

137. Action for separation. *a. In general.*—Costs may be awarded in separation cases in the discretion of the court upon final judgment.⁵² The same rule obtains in all matrimonial actions, that the court can only allow taxable costs in the

867; *Flor v. Flor*, 73 App. Div. 262, 76 N. Y. Supp. 813.

⁴⁶*Mercer v. Mercer*, 73 Hun, 192, 56 N. Y. S. R. 117, 25 N. Y. Supp. 867; *Percival v. Percival*, 28 N. Y. Week. Dig. 155, 14 N. Y. S. R. 255; *Williams v. Williams*, 17 N. Y. Civ. Proc. Rep. 297, 25 N. Y. S. R. 186, 6 N. Y. Supp. 645; *Straus v. Straus*, 67 Hun, 491, 50 N. Y. S. R. 845, 22 N. Y. Supp. 567.

⁴⁷*Hopkins v. Hopkins*, 21 N. Y. Week. Dig. 174.

⁴⁸*Millady v. Stein*, 19 Misc. 652, 44 N. Y. Supp. 408. *Contra*, *Kellogg v. Stoddard*, 40 Misc. 92, 81 N. Y. Supp. 271.

⁴⁹*Whitney v. Whitney*, 26 Jones & S. 335, 19 N. Y. Civ. Proc. Rep. 265, 33 N. Y. S. R. 704, 11 N. Y. Supp. 582; *Mahon v. Mahon*, 18 Jones & S. 92; *Sandford v. Sandford*, 40 Hun. 540, 44 Hun. 563.

⁵⁰*Clark v. Clark*, 13 Daly, 497; *Brisbane v. Brisbane*, 67 How. Pr. 184, 5 N. Y. Civ. Proc. Rep. 352, Affirmed in 34 Hun, 339; *Walker v. Walker*, 82 N. Y. 260.

⁵¹*Mendel v. Mendel*, 25 N. Y. Week. Dig. 314, 4 N. Y. S. R. 556.

⁵²*Jacquin v. Jacquin*, 36 Hun, 378, 2 How. Pr. N. S. 203, 7 N. Y. Civ. Proc. Rep. 327.

final judgment, and cannot grant counsel fees therein. They must be granted pending the action for services to be rendered, and upon motion.⁵³ Costs are not usually allowed against the wife when she fails, but they can be allowed.⁵⁴

Where the wife is plaintiff and presents a *prima facie* case, counsel fees will be allowed.⁵⁵

b. Counsel fees denied.—Counsel fees will be denied where it appears that the wife has sufficient property to maintain her action;⁵⁶ or that she does not make out a *prima facie* case;⁵⁷ or that, upon a disagreement of a jury, additional counsel fees are demanded, and the husband is poor;⁵⁸ or where the wife has had a judgment against her, from which she has not appealed, but has brought a new action before another court to escape the condemnation of her acts pronounced by the first court;⁵⁹ or where the wife refuses to live with her husband in suitable apartments;⁶⁰ or where the wife is plaintiff and the defendant is a bigamist, and therefore she was not the wife of the defendant and did not need to bring this action;⁶¹ or where the cause of action is stale.⁶²

In some cases counsel fees have been refused and the wife sent to police court for alimony.⁶³

c. Counsel fees upon appeal.—Counsel fees will be allowed when the husband appeals from a judgment against him.⁶⁴

⁵³*Donnerstag v. Donnerstag*, 4 669, 28 How. Pr. 218; *Bertschy v. Month*, L. Bull. 53.

⁵⁴*Williams v. Williams*, 130 N. Y.

193, 14 L. R. A. 220, 41 N. Y. S. R.

280, 27 Am. St. Rep. 517, 29 N. E.

98; *Straus v. Straus*, 67 Hun. 491.

50 N. Y. S. R. 845, 22 N. Y. Supp.

567; *Winton v. Winton*, 31 Hun, 290.

⁵⁵*Douglas v. Douglas*, 5 Hun, 140,

13 Abb. Pr. N. S. 291; *Miers v.*

Miers, 35 Misc. 476, 71 N. Y. Supp.

1058; *Browne v. Browne*, 9 N. Y.

Civ. Proc. Rep. 180; *Bertschy v.*

Bertschy, 14 N. Y. Week. Dig. 111.

⁵⁶*Marwell v. Marwell*, 28 Hun, 566.

⁵⁷*Solomon v. Solomon*, 3 Robt.

Bertschy, 14 N. Y. Week. Dig. 111.

⁵⁸*Kittle v. Kittle*, 8 Daly, 72.

⁵⁹*Deisler v. Deisler*, 65 App. Div.

208, 72 N. Y. Supp. 560.

⁶⁰*Kirsch v. Kirsch*, 45 N. Y. S. R.

287, 18 N. Y. Supp. 447.

⁶¹*Blinks v. Blinks*, 5 Misc. 193, 25

N. Y. Supp. 768.

⁶²*Curtis v. Curtis*, 29 Misc. 257, 61

N. Y. Supp. 59.

⁶³*Patton v. Patton*, 13 Misc. 726.

69 N. Y. S. R. 567, 35 N. Y. Supp.

250.

⁶⁴*Haddock v. Haddock*, 75 App.

Div. 565, 78 N. Y. Supp. 304; *Anony-*

It is against public policy for a wife to agree with her attorney to compensate him by giving him a portion of her alimony. An order which authorizes a compliance with such an agreement should be set aside.⁶⁵

d. Rights of the attorney upon a settlement.—(See § 136, subd. *f.*) The courts will enforce an agreement that the husband made upon the settlement of the action, to pay the attorney for the wife.⁶⁶ The husband is liable for the fees of the wife's attorney where she voluntarily returns to her husband, although no counsel fee had been awarded in the action;⁶⁷ and this is so although the husband was the plaintiff in the action.⁶⁸ The attorney must proceed in his own name, whether he proceeds by motion or by action.⁶⁹

e. How the payment of counsel fees may be enforced.—(See § 136, subd. *g*, *supra*.) The payment of costs allowed in the final judgment cannot be enforced by contempt proceedings, but by execution, under § 1240 of the Code of Civil Procedure.⁷⁰ If the order includes alimony, payment of the entire sum may be enforced by contempt proceedings, though such an order for the payment of costs is unauthorized.⁷¹

The court will not listen to a husband upon an application to reduce the amount of alimony and counsel fees, and to purge him of contempt in not paying the same, as long as he remains outside of the jurisdiction of the court and does not submit himself to the court.⁷² Costs awarded to a wife belong to her, but

mous, 15 Abb. Pr. N. S. 307; *McBride v. McBride*, 55 Hun. 401, 8 N. Y. Supp. 448. *Contra*, *Winton v. Winton*, 31 Hun. 290.

⁶⁵*Van Fleck v. Van Fleck*, 21 App. Div. 274, 47 N. Y. Supp. 470.

⁶⁶*Smith v. Smith*, 35 Hun. 378, 15 N. Y. S. R. 804; *Van Gieson v. Van Gieson*, 26 App. Div. 347, 49 N. Y. Supp. 781.

⁶⁷*Naumer v. Gray*, 41 App. Div. 361, 58 N. Y. Supp. 476.

⁶⁸*Hays v. Ledman*, 28 Misc. 575, 59 N. Y. Supp. 687.

⁶⁹*Chase v. Chase*, 65 How. Pr. 306, 29 Hun. 527.

⁷⁰*Jacquin v. Jacquin*, 36 Hun. 378, 2 How. Pr. N. S. 206, 7 N. Y. Civ. Proc. Rep. 327.

⁷¹*People ex rel. Woolf v. Jacobs*, 5 Hun. 428, 433, Affirmed in 66 N. Y. 8; *Lansing v. Lansing*, 4 Lans. 377.

⁷²*Sibley v. Sibley*, 66 App. Div. 552, 73 N. Y. Supp. 244.

her attorney has a lien thereon, which he may enforce after her death.⁷³

133. Action to annul a marriage. *a. Counsel fees allowed.*
—Costs in these actions are in the discretion of the court. Under proper circumstances, where the husband is the plaintiff, alimony and counsel fees may be allowed to the wife in an action to have his marriage with her declared void on the ground that she had a former husband living at the time of the marriage;⁷⁴ but they will be denied when the fact of the former marriage is admitted.⁷⁵ Counsel fees will also be allowed in an action to annul a marriage that was induced by fraud and duress,⁷⁶ or where the marriage was induced by fraud only.⁷⁷

b. Counsel fees denied.—But counsel fees and alimony will be refused in an action brought by a wife to have a marriage declared void.⁷⁸ This has been held in an action to annul a marriage on account of the impotency of the husband;⁷⁹ also in an action to have a marriage annulled on the ground that the wife was under the age of legal consent when it was contracted.⁸⁰ It has been held that the court can grant alimony and counsel fees in such actions brought by the wife.⁸¹ But this case must be

⁷³*Lachenmeyer v. Lachenmeyer*, 65 How. Pr. 423.

⁷⁴*North v. North*, 1 Barb. Ch. 241; *O'Dea v. O'Dea*, 31 Hun. 441, 101 N. Y. 23, 4 N. E. 110; *Hopper v. Hopper*, 92 Hun. 415, 36 N. Y. Supp. 610; *Griffin v. Griffin*, 47 N. Y. 134; *Sinn v. Sinn*, 3 Misc. 598, 52 N. Y. S. R. 855, 23 N. Y. Supp. 339; *Wabberson v. Wabberson*, 27 Misc. 125, 57 N. Y. Supp. 405; *Appleton v. Warner*, 51 Barb. 270; *Higgins v. Sharp*, 164 N. Y. 4, 8 N. Y. Anno. Cas. 139, 58 N. E. 9; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460.

⁷⁵*Appleton v. Warner*, 51 Barb. 270.

⁷⁶*Lee v. Lee*, 4 N. Y. Civ. Proc. Rep. 321, 66 How. Pr. 207.

⁷⁷*Meo v. Meo*, 22 Abb. N. C. 58, 15 N. Y. Civ. Proc. Rep. 308, 18 N. Y. S. R. 270, 2 N. Y. Supp. 569.

⁷⁸*Isaacsohn v. Isaacsohn*, 3 Month. L. Bull. 73; *Meo v. Meo*, 22 Abb. N. C. 58, 15 N. Y. Civ. Proc. Rep. 308, 18 N. Y. S. R. 270, 2 N. Y. Supp. 569; *Herron v. Herron*, 28 Misc. 323, 59 N. Y. Supp. 861.

⁷⁹*Bloodgood v. Bloodgood*, 59 How. Pr. 42; *Bartlett v. Bartlett*, Clarke Ch. 460; *North v. North*, 1 Barb. Ch. 243. *Contra*, *Allen v. Allen*, 59 How. Pr. 27, 8 Abb. N. C. 175.

⁸⁰*Herron v. Herron*, 28 Misc. 323, 59 N. Y. Supp. 861.

⁸¹*Allen v. Allen*, 8 Abb. N. C. 175, 59 How. Pr. 27.

deemed overruled by the later cases. Counsel fees have been refused when the action was brought to annul a marriage because the wife had another husband living at the time of the second marriage, which fact was known at the time to both parties.⁸²

The court cannot compel a mother, who has brought an action under § 1744 of the Code of Civil Procedure to procure an annulment of a marriage contracted by her son when under the age of legal consent, to pay alimony and counsel fees to the defendant.⁸³ Although the court has no jurisdiction upon an application by a third party to set aside a divorce, as obtained by fraud, it can impose costs of a motion or of a special proceeding upon such third person; but it has no authority to impose a lump sum.⁸⁴

139. Costs in other actions between husband and wife.—The court has power to grant counsel fees in an action brought by the wife against the husband to compel him to support her in a suitable manner.⁸⁵ Where a wife sues her husband for assault and battery, and is defeated on the ground that she cannot maintain the action because of the unity of the parties, the same legal unity will prevent costs being taxed against her.⁸⁶

⁸²*Hopper v. Hopper*, 92 Hun. 415. ⁸⁵*Ramsden v. Ramsden*, 28 Hun, 71 N. Y. S. R. 664, 36 N. Y. Supp. 285, 2 N. Y. Civ. Proc. Rep. (Browne) 610; *Kinzey v. Kinzey*, 7 Daly, 460, 416, 2 N. Y. Civ. Proc. Rep. (Mc-

⁸³*Stivers v. Wise*, 18 App. Div. Carty) 408, 15 N. Y. Week. Dig. 481, 316, 46 N. Y. Supp. 9.

⁸⁴*Abbe v. Abbe*, 22 App. Div. 483.

⁸⁵*Simmons v. Simmons*, 32 Hun, 48 N. Y. Supp. 25.

CHAPTER XIV.

COSTS AND ALLOWANCES IN CRIMINAL MATTERS, IN ACTIONS FOR PENALTIES, AND IN PROCEEDINGS UNDER THE LIQUOR TAX LAW.

- 140. Allowance upon the trial of an indictment, where the offense is punishable with death.
- 141. Personal and incidental expenses of counsel in capital cases.
- 142. Allowance for appeal in capital cases.
- 143. Allowance to counsel appointed to aid the district attorney.
- 144. Liability of complainant or of prisoner in criminal cases for the costs of the proceedings.
- 145. Costs in actions for violation of the game law.
- 146. Action for other penalties.
- 147. Proceedings under the liquor tax law.

140. Allowance upon the trial of an indictment, where the offense is punishable with death.— It has been the custom of our courts from time immemorial, when a defendant was without counsel and without means with which to procure counsel, to assign some member of the bar to defend him. Until the enactment of the Code of Criminal Procedure there was no power in the court to order payment for such services.¹ In 1881, § 308 of the Code of Criminal Procedure was enacted, which simply provided for the assignment of counsel. This was amended in 1893 by chapter 521, which provided that “when services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death, the court in which the defendant is tried may, in its discretion, and upon satisfactory proof that such defendant is wholly destitute of means, award to such counsel reasonable com-

¹*People ex rel. Brown v. Onondaga Niagara County*, 78 N. Y. 622; *People ex rel. Hadley v. Albany County*, 3 How. Pr. N. S. 1, 4 N. Y. Crim. Rep. 102. Affirmed in 102 N. Y. 691; *People ex rel. Ransom v.*

compensation for his services, which shall be a charge upon the county in which the indictment in the action is found, to be paid out of the proper fund upon the certificate of the judge or justice presiding at the trial."

This section was further amended by chapter 427 of the Laws of 1897, and the section has remained unchanged since that date.

The amendment of 1897 for the first time introduced the limitation of \$500 in addition to the personal and incidental expenses of the attorney. No allowance can be made to counsel assigned after arraignment.² The court will assign counsel free from any promptings or suggestion whatsoever, either by the defendant or by counsel desiring such assignment.³ The courts have construed this limitation of amount to mean that where more than one counsel is assigned the court cannot grant an allowance of more than \$500, and may apportion that sum between counsel.⁴

Where the court makes an allowance in excess of that provided for by this section, such order is void, and the proper officers should refuse to pay it; but no appeal lies from such order.⁵ After the first amendment to this section in 1893, and before the second amendment in 1897, it was held that there was no limitation imposed by the statute as to the number of counsel assigned.⁶ This has been rendered obsolete by the amendment of 1897. When two persons are jointly indicted and the same counsel is assigned for both, the allowance may exceed \$500, especially when they demand separate trials.⁷

There is no trial within the meaning of § 308 of the Code of

²*People v. Di Medicis*, 39 Misc. 438, 80 N. Y. Supp. 212. *Contra*, *People ex rel. Acritelli v. Foster*, 40 Misc. 19, 81 N. Y. Supp. 212.

³*People v. Fuller*, 35 Misc. 189, 71 N. Y. Supp. 487.

⁴*People v. Heiselbetz*, 30 App. Div. 199, 51 N. Y. Supp. 685.

⁵*People v. Heiselbetz*, 30 App. Div. 199, 51 N. Y. Supp. 685.

⁶*People ex rel. Roth v. Fitch*, 51 N. Y. Supp. 683.

⁷*People v. McElvaney*, 36 Misc. 316, 10 N. Y. Anno. Cas. 316, 73 N. Y. Supp. 639.

Criminal Procedure, so as to justify an allowance, where upon arraignment the defendant pleads not guilty to an indictment with a specification of insanity thereto, and a commission appointed by the court adjudges that the defendant was insane at the time of the commission of the crime and at the time of the examination. The proceedings before the commissioners formed no part of the trial of the issue joined by the plea of the defendant to the indictment. The only effect of such proceedings was to postpone the trial of the defendant until he became sane. No allowance could therefore be made to counsel for his services.⁸

141. Personal and incidental expenses of counsel in capital cases.

—The personal and incidental expenses of the counsel mentioned in the statute are such as relate to the expenses incurred by the counsel on his personal account, and do not refer to the expenses of expert witnesses, although they were called to meet the evidence of expert witnesses on the part of the people;⁹ nor are daily transcripts of the evidence furnished by the stenographer, personal and incidental expenses.¹⁰ The cost incurred in having a person interview witnesses and take their statements, and marshal the evidence for use upon the trial, are not personal and incidental expenses within the meaning of the statute.¹¹ But the expense of an interpreter when the attorney does not understand the language of the prisoner and his witnesses and they do not understand the English language is a proper subject for allowance.¹²

142. Allowance for appeal in capital cases.—The limitation imposed by the words “not exceeding \$500” applies to the trial

⁸*People ex rel. Mullen v. Coler*, 61 Misc. 430, 75 N. Y. Supp. 290, App. Div. 538, 70 N. Y. Supp. 639.

⁹*People ex rel. Lery v. Grout*, 37

¹⁰*People ex rel. Cantrell v. Coler*, Misc. 430, 75 N. Y. Supp. 290, 61 App. Div. 598, 70 N. Y. Supp.

¹¹*Re Waldheimer*, 84 App. Div. 366, 82 N. Y. Supp. 916.

¹²*People ex rel. Lery v. Grout*, 37

court and to the appellate court separately, and not collectively.¹³

143. Allowance to counsel appointed to aid the district attorney.

—Section 204 of the county law (Laws 1892, chap. 686) reads as follows: “The district attorney of any county in which a capital or other important criminal action is to be tried, with the approval in writing of the county judge of the county, which shall be filed in the office of the county clerk, may employ counsel to assist him on such trial; and the costs and expenses thereof, to be certified by the judge presiding at the trial, shall be a charge upon the county in which the indictment is found.” An attorney assigned to assist the district attorney in a case, who argues the case in the court of appeals, and opposes a motion for a new trial on the ground of newly discovered evidence, is not entitled to a writ of certiorari to review the action of the board of supervisors in auditing the claim, when he presents no certificate of any judge.¹⁴

144. Liability of complainant or of prisoner in criminal cases for the costs of the proceedings.—A complainant upon whose motion an order of arrest is issued is not liable for costs in a proceeding arising therefrom to punish a third person for contempt of court in obstructing the officer in the execution of the warrant. Both of these proceedings are criminal proceedings, and not civil, and no statute gives costs in either.¹⁵ Section 719 of the Code of Criminal Procedure is as follows: “When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find, that the prosecution was malicious or without probable cause, the court must order the prosecutor to

¹³*People v. Ferraro*, 162 N. Y. 545, 57 N. E. 167; *People v. Barone*, 161 N. Y. 475, 55 N. E. 1091.

¹⁴*People ex rel. Peck v. Genesee County*, 61 App. Div. 545, 70 N. Y. Supp. 578.

¹⁵*People ex rel. New York Soc. for Prevention of Cruelty to Children v. Gilmore*, 88 N. Y. 626, 14 N. Y. Week. Dig. 206.

pay the costs of the proceedings, or to give satisfactory security, by written undertaking, with one or more sureties, to pay the same to the county within thirty days after the trial."

No appeal lies to the county court from an order under the foregoing section, requiring the prosecutor to pay the costs of the proceedings.¹⁶

A provision in a city charter which gives the recorder power to try certain criminal cases, and provides that when a prisoner elects not to be so tried, but waives an examination, he must pay the costs that have accrued up to that time, and in default thereof he may be sent to the jail for a period not exceeding five days, is constitutional.¹⁷

145. Costs in actions for violation of the game law.—Under § 186 of chap. 31 of the General Laws the people, in case of recovery of any amount in an action for a penalty under this act, or in an action authorized by the article on forests and public parks, are entitled to full costs. These costs may be collected by body execution under § 189 of said chapter. In case there should be no recovery the defendant would be entitled to costs under § 3229 of the Code of Civil Procedure.

Costs recovered by the defendant would doubtless be collected under § 3241 of the Code of Civil Procedure, and not under § 3243, as there is no provision for the payment of any recovery to the county. There are no decisions under the present law, but the decisions under the former laws make that distinction, and therefore are applicable to the present law to that extent.¹⁸ But an execution cannot be issued to collect such costs. Code Civ. Proc. § 1985.

¹⁶*People v. Carr*, 54 Hun, 443, 28 N. Y. S. R. 287, 7 N. Y. Supp. 724. *ner*, 38 N. Y. S. R. 349, 14 N. Y. Supp. 334, Affirmed in 128 N. Y. 416.

¹⁷*People ex rel. Staudacher v. Webb*, 16 Hun, 42, 28 N. E. 364; *People v. Smith*, 47 N. Y. S. R. 170, 20 N. Y. Supp. 332;

¹⁸*People ex rel. Fargo v. Rosendale*, 76 Hun, 112, 57 N. Y. S. R. 377, 27 N. Y. Supp. 825, Affirmed in 142 N. Y. 670, 37 N. E. 571; *People v. Tan- E. 516, 20 N. Y. S. R. 496; Gerry v. Liddle* 82 Hun. 85. 63 N. Y. S. R. 358, 31 N. Y. Supp. 58.

146. Action for other penalties.— By the amendment made to subd. 3 of § 3228 of the Code of Civil Procedure by chap. 110 of the Laws of 1898, actions brought by the people to recover a fine or penalty are placed in the same category, with respect to costs, as an action to recover damages for assault, battery, false imprisonment, etc. Costs are given to the plaintiff, if any recovery is had, but they cannot exceed the damages if they are less than \$50.¹⁹

To charge defendant's costs upon a county the benefit referred to in § 3243 of the Code of Civil Procedure must be one peculiar to the county in its relation to the main objects sought to be obtained in the action.²⁰

147. Proceedings under the liquor tax law.— Proceedings by certiorari to revoke a liquor tax license is a special proceeding, and costs are taxable as such under § 3240 of the Code of Civil Procedure.²¹ Costs for making a case cannot be charged, where it is waived by stipulation.²²

In a proceeding instituted under subd. 2 of § 28 of the liquor tax law, to revoke the certificate, costs cannot be awarded against the county treasurer, payable out of any excise money that may come into his hands. Such a provision as to costs is applicable to a proceeding commenced under § 29 of that act. The county treasurer is not chargeable personally with costs on the ground that he did not bring an action to cancel the certificate, when he was informed that the holder of the certificate was unlawfully trafficking in liquor. Subdivision 2 of § 28 does not enjoin that duty on him.²³

¹⁹*People v. Strauss*, 48 App. Div. 198, 62 N. Y. Supp. 812.

²¹*Wood v. Randolph*, 9 Misc. 507, 30 N. Y. Supp. 344; *Re Loper*, 32 Misc.

²⁰*People v. Hodnett*, 81 Hun. 137, 62 N. Y. S. R. 699, 30 N. Y. Supp.

534, 67 N. Y. Supp. 329.

735; *People v. Alden*, 112 N. Y. 117.

²²*Re Loper*, 32 Misc. 534, 67 N. Y. Supp. 329.

19 N. E. 516, 20 N. Y. S. R. 496;

²³*Re Seymour*, 47 App. Div. 320.

Gerry v. Liddle, 82 Hun. 85, 63 N. Y. S. R. 358, 31 N. Y. Supp. 58;

62 N. Y. Supp. 25.

People v. Smith, 47 N. Y. S. R. 170,

20 N. Y. Supp. 332.

Whether a holder of a certificate shall be required to pay costs of a proceeding brought to cancel his certificate on the ground that he has not secured the required consent of two thirds of the property owners, when such omission was made in good faith, rests in the discretion of the court. In one case where he was held liable for the costs his license was not revoked. Costs were imposed in this case because the proceeding was the result of the negligence of the holder of the certificate.²⁴

In another case the court revoked the license, but did not compel him to pay costs, because the loss of the certificate was considered heavy enough punishment for the negligence of an agent.²⁵ Although the liquor certificate has expired by its own limitation before the order revoking it is made, the court may yet award costs to the successful party.²⁶

²⁴*Re Johnson*, 18 Misc. 498, 42 N. Y. Supp. 1074. ²⁶*Re Lyman*, 48 App. Div. 275, 62 N. Y. Supp. 846; *Re Lyman*, 28 Misc.

²⁵*Lyman v. Murphy*, 33 Misc. 349, 408, 59 N. Y. Supp. 968.
68 N. Y. Supp. 490.

CHAPTER XV.

SPECIAL PROCEEDINGS.

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148. In general.—The general provision for costs in these proceedings is contained in § 3240 of the Code of Civil Procedure, which is as follows: "Costs in a special proceeding instituted in a court of record, or upon an appeal in a special proceeding taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party in the

discretion of the court, at the rates allowed for similar services in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner."

149. Mandamus. *a. In general.*—Costs upon the granting of a mandamus are in the discretion of the court, under § 2086 of the Code of Civil Procedure, which reads as follows: "Where an alternative writ of mandamus has been issued, costs may be awarded, as in an action; except that, upon making a final order, the costs are in the discretion of the court. Where an application for a peremptory writ of mandamus is granted or denied, without a previous alternative mandamus, costs not exceeding \$50 and disbursements may be awarded to either party, as upon a motion." Where the order is silent as to costs, none are allowed.¹

The discretion of the trial court in granting or refusing costs will not usually be reviewed on appeal.²

b. When costs are not imposed.—Ordinarily, costs will not be awarded against an officer acting in good faith.³ Costs will not be awarded to a board of supervisors when the relator is defeated upon the ground that he should have brought his proceedings against the county treasurer, when that official has refused to obey the order of the court, by the advice of the board of supervisors.⁴

It is not the practice, upon awarding a peremptory writ, to grant costs against judges of subordinate courts or other public officials intrusted with the discharge of judicial duties.⁵ But when judges make a return to an alternative writ and are defeated, they will be charged with costs. They can always pro-

¹*People ex rel. Magee v. Densmore*, 1 Barb. 557; *People ex rel. Kipp v. Harris*, 6 Abb. Pr. 30; *People ex rel. Collier v. Dutchess County*, 3 How. Pr. 380.

²*People ex rel. Burroughs v. Brinkhoff*, 68 N. Y. 259; *People ex rel. Smith v. Flagg*, 5 Abb. Pr. 232.

⁴*People ex rel. Cole v. Greene County*, 15 Abb. N. C. 447.

⁵*People ex rel. Martin v. Albright*, 23 How. Pr. 306, 14 Abb. Pr. 305.

³*Hecox v. Ellis*, 19 Wend. 157.

tect themselves against costs by obeying the alternative writ. Where they omit to do so and make a return, it may be presumed that they are indemnified against costs by the party in interest.⁶

c. When costs are imposed.—Costs will be imposed where a public official has committed an error in judgment in refusing to give the relator a certificate required by law, and he has been compelled to commence these proceedings to obtain it.⁷

d. Upon whom costs are imposed.—Costs should be imposed upon the relator when the application for a writ is denied, and the law against the relator is plain.⁸ It is not sufficient to render one not a party to the proceedings liable for costs, that the return was made at his request and he opposed the issuing of the peremptory writ.⁹ But a party resisting a mandamus by requiring the relators to plead or demur, and subsequently joining in the demurrer, is liable for the costs of the demurrer if the relators have judgment.¹⁰ Where the application is premature, but the respondent still had time to do the duty sought to be coerced, costs will not be allowed to either party.¹¹

e. Additional allowance.—There is no warrant in the statute for granting an extra allowance upon the final order in these proceedings.¹²

f. Terms imposed upon amendment.—An alternative writ may be amended only at special term. The same terms are usually imposed as upon the amendment to a pleading in an action. Where the amendment changes the entire scope of the

⁶*People ex rel. Fishers v. New York Common Pleas*, 18 Wend. 534.

⁷*People ex rel. Smith v. Hasbrouck*, 54 How. Pr. 418.

⁸*People ex rel. Sanders v. Colborne*, 20 How. Pr. 378.

⁹*People ex rel. Holbrook v. Jefferson County Common Pleas Judges*, 2 Wend. 301.

¹⁰*People ex rel. Hale v. Onondaga Common Pleas*, 3 Wend. 304.

¹¹*People ex rel. Smith v. Richmond*, 5 Misc. 26, 25 N. Y. Supp. 144.

¹²*People ex rel. Rolf v. Coler*, 58 App. Div. 347, 68 N. Y. Supp. 1101;

People ex rel. Boyd v. Hertle, 46 App. Div. 505, 61 N. Y. Supp. 965.

proceeding, the terms should be the payment of all the defendant's costs subsequent to the service of the writ.¹³

g. Stay for nonpayment of costs.—The objection that the relator has not paid the costs upon the dismissal of a previous application for the same writ cannot be raised for the first time upon an appeal. It should have been raised upon the motion. Not having been raised then, it is waived.¹⁴

h. Amount of costs.—Costs in the discretion of the court are allowed the same as in an action, when an alternative writ is issued. Where an application for a peremptory writ is granted or denied without a previous alternative writ, costs not exceeding \$50 may be awarded to either party.¹⁵ Where, on an agreed statement of facts, a peremptory writ is obtained, when but for such statement an alternative writ would have been necessary, it was held that the costs were discretionary with the court.¹⁶ It has been held that where a court, upon overruling a demurrer to a return upon an alternative writ of mandamus, awards costs, the costs must be the costs upon an issue of law, and not motion costs.¹⁷ But under the amendment to § 3239 of the Code of Civil Procedure by chap. 181 of Laws of 1900, the court would have power upon the trial of an issue of law to award \$10 costs, and it would seem that that amount of costs might be awarded in these proceedings.

Where public officers have final judgment after return to a writ of alternative mandamus, costs may be awarded as in an action, in the discretion of the court. These costs are taxed under the provisions of § 3251 of the Code of Civil Procedure, and therefore double costs are taxable under the provisions of § 3258 of the Code of Civil Procedure.¹⁸ But where an applica-

¹³*People ex rel. McDonald v. R. Co.* 47 Hun, 44, 28 N. Y. Week. Clausen, 61 App. Div. 184, 70 N. Y. Dig. 16, 14 N. Y. S. R. 168. Supp. 417.

¹⁴*Re Loftus*, 41 N. Y. S. R. 357, *skill Water Comrs.* 58 App. Div. 554, 16 N. Y. Supp. 327.

¹⁵*People ex rel. Scribner v. Peck-* 69 N. Y. Supp. 93.

¹⁶Code Civ. Proc. § 2086.

¹⁷*People ex rel. Bates v. Speed*, 73

¹⁸*People v. New York, L. E. & W.* Hun, 302, 57 N. Y. S. R. 295, 26

tion for a peremptory writ of mandamus is denied without a previous alternative mandamus, costs cannot exceed \$50 and disbursements, and double costs are not taxable, because the costs allowed are not taxable under § 3251 of the Code of Civil Procedure.¹⁹ The cases that held that only motion costs could be awarded when an application for a peremptory writ was denied have been overruled by a change in § 2086 of the Code of Civil Procedure. Fifty dollars costs are now allowable.²⁰ Where at the time of the hearing the court can grant no relief, even if the relator's position is correct, the application for a peremptory writ should be denied, without costs.²¹

i. Costs upon appeal.—Costs upon appeals are the same as costs upon appeals in actions.²² Where a peremptory writ is granted with costs, and a stay pending an appeal is refused, the defendant has a right to appeal after he has complied with the writ, because he is entitled to recover back the costs that he has paid, if the writ should be reversed.²³ When costs are awarded as a matter of discretion, they will not usually be reviewed on appeal.²⁴ Where the special term sustains a demurrer with costs, which order is affirmed at the appellate division with costs, but is reversed in the court of appeals, with leave to the defendant to answer upon payment of costs, the successful party may apply at special term for an allowance of costs; but the costs of the appellate division can be obtained only upon an application to it.²⁵ Where the appellate division affirms a peremptory writ

N. Y. Supp. 254; *People ex rel. Sanders v. Colborne*, 20 How. Pr. 378; *People ex rel. Weeks v. Ewen*, 8 Abb. Pr. 359 note; *People ex rel. Lumley v. Lewis*, 23 How. Pr. 159.

¹⁹*People ex rel. Hall v. Hempstead*,

42 App. Div. 250, 59 N. Y. Supp. 10.

²⁰*People ex rel. Stilwell v. New*

York Produce Exchange, 64 How. Pr.

523; *People ex rel. Cagger v. Schuy-*

ler County, 2 Abb. Pr. N. S. 78.

²¹*Re Schirager*, 36 N. Y. S. R. 534,

13 N. Y. Supp. 384.

²²Code Civ. Proc. § 3240; *People*

ex rel. Bray v. Ulster County, 65

Re Martin, 128 N. Y. 605, 38 N. Y. S. R. 885, 27 N. E. 1017.

²³*People ex rel. Martin v. Albright*, 23 How. Pr. 306.

²⁴*People ex rel. Keene v. Queens County*, 83 Hun, 237, 64 N. Y. S. R.

159, 31 N. Y. Supp. 569, Affirmed

without opinion in 145 N. Y. 597, 40

N. E. 164.

"with costs," the same costs are given as upon an appeal from a judgment.²⁶

When the court of appeals reverses a peremptory writ "with costs," only costs in the court of appeals can be taxed. The courts below, which granted costs to the respondent in the court of appeals, can grant costs to the appellant upon application to them.²⁷ The court may, upon granting a peremptory writ against a public officer, board, or other body, not only award the relator his damages and costs, but may also impose a fine not exceeding \$250 as a penalty for past neglect of duty.²⁸ This applies only to public officials.²⁹

The costs of these proceedings, except where a peremptory writ of mandamus is awarded after the issuing of an alternative writ, may be collected by contempt proceedings.³⁰ The court has, however, a discretion in enforcing the payment of costs by these means, and will refuse to so enforce them when it would be a hardship to do so.³¹

150. Condemnation proceedings. *a. In general.*—Condemnation proceedings are now regulated by §§ 3357-3384 of the Code of Civil Procedure. Before the enactment of that law the question of costs was governed by § 3240 of the Code of Civil Procedure, which relates to special proceedings in general. The costs of a proceeding under a special act which provides for a different procedure from that laid down in the Code are governed by § 3240 of the Code of Civil Procedure. They may be awarded to any party, in the discretion of the court, at the rates allowed for similar services in an action brought in the same court, or on an appeal from a judgment taken to the same court and in

²⁶*People ex rel. Bray v. Ulster County*, 65 How. Pr. 327; Code Civ. Proc. § 3240.

²⁷*People ex rel. Keene v. Queens County*, 83 Hun. 237, 64 N. Y. S. R. 159, 31 N. Y. Supp. 569; *Barnard v. Hall*, 143 N. Y. 339, 38 N. E. 301.

²⁸ Code Civ. Proc. § 2090.

²⁹*People ex rel. Garbutt v. Rochester & S. L. R. Co.* 76 N. Y. 294.

³⁰ Code Civ. Proc. § 2007.

³¹*People ex rel. Meyer v. Masonic Guild & Mut. Ben. Asso.* 22 N. Y. Civ. Proc. Rep. 74, 18 N. Y. Supp. 806.

like manner.³² Where the costs are taxed under § 3240 of the Code of Civil Procedure there can be no extra allowance.³³

The only case where the defendant is entitled to costs upon a preliminary hearing is when the petition is dismissed.³⁴

The only costs that the plaintiff can obtain in these proceedings are those upon the preliminary hearing mentioned in § 3369 of the Code of Civil Procedure. These are the same costs that are mentioned in § 3372, as "costs of trial."³⁵ The hearing before the commissioners is not a trial, but an assessment of damages, and no trial fee can be allowed therefor.³⁶ There is no warrant in allowing separate bills of costs against partners who unite in their answer and are defeated.³⁷

The fact that the plaintiff is entitled to the costs of trial does not deprive the defendant of the other costs of the proceeding, when there has been no offer, or, if an offer has been made, it is smaller than the award.³⁸ The only way that the plaintiff can defeat the defendant's claim for costs is by making the offer as provided in § 3372.³⁹ If this offer is not accepted, and no answer is interposed, the defendant is entitled to costs as of

³² Code Civ. Proc. § 3240.

³³ *Re Brooklyn*, 148 N. Y. 107, 42 N. E. 413; *Re Holden*, 126 N. Y. 589, 38 N. Y. S. R. 504, 27 N. E. 1063; *Re Grade Crossing Comrs.*, 20 App. Div. 271, 46 N. Y. Supp. 1070.

³⁴ Code Civ. Proc. § 3369; *Dansville & Mt. M. R. Co. v. Hammond*, 77 Hun. 39, 59 N. Y. S. R. 49, 28 N. Y. Supp. 454.

³⁵ *Hornellsville Electric R. Co. v. New York, L. E. & W. R. Co.* 83 Hun. 407, 64 N. Y. S. R. 416, 31 N. Y. Supp. 745.

³⁶ *Syracuse v. Benedict*, 86 Hun. 343, 67 N. Y. S. R. 614, 33 N. Y. Supp. 944; *Manhattan R. Co. v. Kent*, 80 Hun. 559, 62 N. Y. S. R. 569, 30 N. Y. Supp. 959. Affirmed in 145 N. Y. 595, 40 N. E. 164; *Johnstown v. Frederick*, 35 App. Div. 44,

54 N. Y. Supp. 412; *St. Johnsville v. Cronk*, 55 App. Div. 633, 67 N. Y. Supp. 419; *Brooklyn Union Elev. R. Co. v. Case*, 82 App. Div. 567, 81 N. Y. Supp. 527.

³⁷ *Manhattan R. Co. v. Kent*, 80 Hun. 559, 62 N. Y. S. R. 569, 30 N. Y. Supp. 959.

³⁸ *Manhattan R. Co. v. Taber*, 78 Hun. 434, 60 N. Y. S. R. 781, 29 N. Y. Supp. 220; *Johnstown v. Frederick*, 35 App. Div. 44, 54 N. Y. Supp. 412.

³⁹ *Syracuse v. Stacy*, 45 App. Div. 260, 60 N. Y. Supp. 1106; *St. Johnsville v. Cronk*, 55 App. Div. 633, 67 N. Y. Supp. 419. Overruled in *Re Brooklyn Union Elev. R. Co.* 176 N. Y. 213, 68 N. E. 249.

course, when the award is larger than the offer.^{39a} These costs are as follows: "Before notice of trial, \$10; after notice of trial, \$15; trial fee, \$30, and where the trial occupies more than two days, \$10.^{39b} If the defendant is under a legal disability to convey, no offer need be made, and the defendant cannot be allowed the costs of the proceeding.⁴⁰ Where there is no allegation in the petition or proof that the plaintiff has made an offer to purchase the property, though there is an adjudication of another court that the parties were unable to agree, the defendant is entitled to costs.⁴¹ Where there is one petition to condemn several pieces of land belonging to different owners, and it is stipulated that the evidence taken in one should be considered as taken in all, there is but a single proceeding, although separate orders for each piece be entered.⁴² The costs provided for in § 3369 of the Code of Civil Procedure are only granted to a defendant when he interposes an answer and succeeds thereon. They are the same as are allowed to the defendant in a supreme court action, including the allowances for proceedings before and after notice of trial. These costs are allowed, as of course, and are taxed by the clerk.⁴³

b. Additional allowance.—The additional allowance provided for in § 3372 of the Code of Civil Procedure is based upon the whole allowance, where there has been no offer. Where there has been an offer, it is based upon the difference between the amount of the offer and the amount of award.⁴⁴ These allowances are not given to punish the litigants for improper motives;⁴⁵ nor do they depend upon an answer being served and the

^{39a}*Re Brooklyn Union Elev. R. Co.*
176 N. Y. 213. 68 N. E. 249.

^{39b}*Re Brooklyn Union Elev. R. Co.*
176 N. Y. 213. 68 N. E. 249.

⁴⁰*Manhattan R. Co. v. McKee*, 1
App. Div. 488. 72 N. Y. S. R. 595.
37 N. Y. Supp. 269.

⁴¹*Manhattan R. Co. v. Kent*, 80
Hun. 559. 62 N. Y. S. R. 569. 30 N.
Y. Supp. 959.

⁴²*Re Prospect Park & C. I. R. Co.*
67 N. Y. 371.

⁴³Code Civ. Proc. § 3369.

⁴⁴*United States v. Engeman*, 27
Abb. N. C. 141.

⁴⁵*St. Lawrence & A. R. Co. v. De
Camp*, 52 N. Y. S. R. 10, 23 N. Y.
Supp. 544.

matter being difficult and extraordinary, as in allowances in an action,⁴⁶ but are intended as an indemnity to the prevailing party for expenses necessarily or reasonably incurred in the proceedings.⁴⁷ Attorneys who have appeared for the owner of the premises cannot obtain an order that they be paid out of the fund awarded to the owner because this is not a case of cost and allowances. Their right to remuneration rests upon their contract with the owner. Section 3254 of the Code of Civil Procedure, limiting the amount of extra allowance to \$2,000, does not apply to condemnation proceedings.⁴⁸ An allowance may be granted in a proceeding in the United States court to acquire lands in this state.⁴⁹

c. How the allowance of costs is reviewed.—The allowance of costs cannot be reviewed on taxation. The remedy is by a motion to correct the judgment, and by an appeal from the order made thereon, or by an appeal from the judgment.⁵⁰

d. Costs upon abandonment of the proceedings.—These proceedings may be abandoned and discontinued at any time before the expiration of thirty days after the entry of the final order. The fees and expenses of the commissioners must be paid, and such other costs and expenses as shall be directed in the final order.⁵¹ The costs and expenses mean the taxable costs of the parties who have appeared, costs of motions, and allowances to the guardian *ad litem* for infants.⁵²

151. Proceedings brought by railroads. *a. Proceeding brought by one railroad to cross another.*—The proceedings brought by

⁴⁶*Re Lake Shore & M. S. R. Co.* 65 Hun, 538, 48 N. Y. S. R. 360, 20 N. Y. Supp. 573. ⁵⁰*United States v. Engeman*, 27 Abb. N. C. 141.

⁴⁷*St. Lawrence & A. R. Co. v. De Camp*, 52 N. Y. S. R. 10, 23 N. Y. Supp. 544. ⁵¹*Re Le Roy*, 35 App. Div. 177, 55 N. Y. Supp. 149; *Manhattan R. Co. v. Youmans*, 81 Hun, 82, 62 N. Y. S. R. 562, 30 N. Y. Supp. 566; Code Civ. Proc. § 3374.

⁴⁸*Bruyn v. New York, W. S. & B. R. Co.* 17 N. Y. Week. Dig. 471. ⁵²*Onondaga County v. White*, 38 Misc. 587, 77 N. Y. Supp. 1074.

⁴⁹*Re Brooklyn*, 10 Misc. 650, 24 N. Y. Civ. Proc. Rep. 182, 65 N. Y. S. R. 261, 32 N. Y. Supp. 182.

one railroad to cross another is not strictly a condemnation proceeding. Costs are in the discretion of the court, under § 3240 of the Code of Civil Procedure.⁵³

b. Proceedings to condemn a right of way for elevated railroads.—The courts do not usually allow costs in a proceeding for condemning the right of way for an elevated railroad.⁵⁴

c. Proceedings under the general railroad act.—A proceeding under the general railroad act is a special proceeding, and costs should be allowed as in an action under § 3240 of the Code of Civil Procedure.⁵⁵

d. Additional allowance.—There is no provision in § 3240 of the Code of Civil Procedure for any extra allowance,⁵⁶ but an extra allowance can be granted as a condition of discontinuance, after report and before confirmation.⁵⁷

e. Trial fee.—A trial fee cannot be allowed when no issue of fact is raised or tried, although disbursements may be allowed.⁵⁸

f. Costs upon appeal by the railroad.—Upon an appeal by the railroad from an award, the appellate division, upon reversing the order of confirmation and sending the matter to new commissioners, has no right to impose costs upon the land owner. If the appeal is taken by the land owner and he is defeated, it is a question whether the court might not, in such a case, have power to impose costs on the land owner.⁵⁹

152. Various proceedings.—An application for an order appointing commissioners to appraise damages caused by the ex-

⁵³*Hornellsville Electric R. Co. v. Co. v. Davis*, 55 N. Y. 145; *Re Syracuse New York, L. E. & W. R. Co.* 83 Hun. 407, 64 N. Y. S. R. 416, 31 N. Y. *Re New York, L. & W. R. Co.* 26 Supp. 745; *Re Lima & H. F. R. Co.* 68 Hun. 252, 52 N. Y. S. R. 186, 22

⁵⁴*Rensselaer & S. R. Co. v. Davis*, N. Y. Supp. 967; *Re Cortland & H. Horse R. Co.* 98 N. Y. 336.

⁵⁵*Re Union Elev. R. Co.* 55 Hun. 163, 28 N. Y. S. R. 386, 7 N. Y. Supp. 853.

⁵⁶*Re South Market Street*, 80 Hun. 246, 61 N. Y. S. R. 626, 29 N. Y. Supp. 1030; *Re Rensselaer & S. R.* 94 N. Y. 287.

⁵⁷*New York, W. S. & B. R. Co. v. Thorne*, 1 How. Pr. N. S. 190.

⁵⁸*Re New York, L. & W. R. Co.* 26 Hun, 592.

⁵⁹*Re New York, W. S. & B. R. Co.*

tention of a street,⁶⁰ or to acquire lands for sewerage purposes,⁶¹ is a special proceeding, and costs should be awarded under § 3240 of the Code of Civil Procedure.

Upon an appeal from an award of commissioners appointed upon a proceeding for altering, widening, or narrowing a street of a village the costs are regulated by § 157 of the Village Law (Gen. Laws, chap. 21) which is as follows "Costs on appeal may be allowed as follows:

"1. If on appeal by the board of trustees the award of the commissioners be affirmed, the county court may allow to the respondent costs of such appeal, against the village, not exceeding \$25.

"2. If on such appeal the award be reversed on the ground that as to a specified owner it is excessive, the court may fix the amount of costs, not exceeding \$50, to be stated in the order, to be paid by the village to such owner, if upon a rehearing the amount awarded to him is not more favorable to the village by the amount of such costs than the first award.

"3. If on appeal by an owner the award be affirmed, costs not exceeding \$25 may be awarded against him, to be recovered by the village.

"4. If on such an appeal the award be reversed, the county court may allow to the owner a sum not exceeding \$25 for the costs of appeal, which shall be a charge against the village."

Under a special law (Laws 1896, chap. 393) for acquiring city-hall property, which provided that appraisers' fees, etc., should not be paid except upon an order of a supreme court judge, and a motion was made for appraisers' fees, etc., it was held that this was not a special proceeding under a general law, but under a special law, and only motion costs could be granted upon such an application, and not costs

⁶⁰*Re South Market Street*, 80 Hun, ⁶¹*Re Long*, 39 N. Y. S. R. 892, 15
246, 61 N. Y. S. R. 626, 29 N. Y. N. Y. Supp. 657.
Supp. 1030.

of a special proceeding.⁶² When such a bill is presented for taxation there must be sufficient evidence produced to enable the justice to pass upon the value of the services rendered, or the amount of the disbursements made.⁶³ The fact that a party has agreed to pay a certain sum for services rendered is no evidence of its value.⁶⁴ Under § 998 of the Greater New York charter (Laws 1897, chap. 378, as amended by Laws 1901, chap. 466), relative to the taxation of the costs, fees, and expenses of the commissioners of estimate and assessment appointed in condemnation proceedings instituted by the city of New York, the commissioners must present proof which will enable the court to see that the number of days charged for by them was necessarily devoted to the proceedings. An allegation which states in general terms that they had performed and discharged their duties as such commissioners, and had been employed a specified number of days, is not sufficient.⁶⁵

But commissioners appointed under the act which provides for the acquisition of property connected with the water supply of the city of New York (Laws 1877, chap. 445, § 17, as amended by Laws 1897, chap. 713), who present affidavits to the effect that each commissioner was actually employed as a commissioner of appraisal in the proceeding a specified number of days, make out a *prima facie* case for compensation for that number of days.⁶⁶

Under the grade crossing act (Laws of 1888, chap. 345), the costs and allowances are governed by § 3372 of the Code of Civil Procedure.⁶⁷

153. Proceedings by taxpayers to investigate the affairs of a village.— In proceedings for the summary investigation into the

⁶²*Re New York*, 69 N. Y. Supp. 178.

⁶⁵*Re New York*, 77 App. Div. 433,

⁶³*People ex rel. Allison v. New York Bd. of Edu.* 26 App. Div. 208, 49 N. Y. Supp. 915.

79 N. Y. Supp. 192.
⁶⁴*Re Collis*, 80 App. Div. 287, 80 N. Y. Supp. 307.

⁶⁶*Re New York*, 72 App. Div. 113, 76 N. Y. Supp. 137.

⁶⁷*Re Buffalo Grade Crossing Comrs.* 19 Misc. 230, 43 N. Y. Supp. 1073.

financial affairs of a village, pursuant to Laws 1892, chap. 685, § 3, the costs are regulated by § 3240 of the Code of Civil Procedure. If the costs are not properly taxed the remedy is the same as in an action.⁶⁸ Attorney and counsel fees have been taxed at special term,⁶⁹ but there seems to be no more warrant for taxing these items in this proceeding than for taxing them in an action.

Costs cannot be charged against persons who are not parties to these proceedings, although it may be that their bills are the ones that are investigated and found irregular.⁷⁰

154. Costs upon opening a highway.—The costs and disbursements upon an application to lay out a highway under Gen. Laws, chap. 19, §§ 83–88, are a charge against the town, if the highway is opened; but this does not include services of counsel for the petitioner.⁷¹ In case the application to lay out the highway is denied the town is not liable for the costs and disbursements in the unsuccessful application.⁷² The liability of the petitioner in case he is defeated is limited to \$50. If he pays this, as costs, to the parties opposing the application, he is not liable to pay the commissioners their fees. In such a case they cannot collect for their services from anyone.⁷³

When a reassessment of damages shall be had on the application of the party for whom damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment; and when application shall be made by two or more persons for the reassessment of damages, all persons so liable for costs are liable in proportion to the amount of damages respectively assessed to them by the first assessment, and may be recovered by action

⁶⁸*Re Plattsburgh*, 27 App. Div. 353.
50 N. Y. Supp. 356.

⁶⁹*Re Plattsburgh*, 27 App. Div. 353,
50 N. Y. Supp. 356.

⁷⁰*Re Hempstead*, 36 App. Div. 321.
55 N. Y. Supp. 345.

⁷¹*Eppig v. New York*, 57 App. Div.
114, 68 N. Y. Supp. 41.

⁷²*Re Miller*, 9 App. Div. 260, 41
N. Y. Supp. 581.

⁷³*Patton v. Miller*, 28 App. Div.
517, 51 N. Y. Supp. 202.

in favor of any person entitled to the same. Gen. Laws, chap. 19, § 92.

Upon an application to lay out a private road the damages are to be paid by the person for whose benefit the road is laid out, unless it shall be certified that the necessity of such private road was occasioned by the alteration or discontinuance of a public highway, in such case the damages must be paid by the town and refunded to the applicant. Gen. Laws, chap. 19, § 117.

But if the amount of damages assessed are increased upon a new hearing regularly had, the applicant must pay the costs of such rehearing. If the damages assessed are not increased upon such rehearing the owner must pay the costs and expenses of such rehearing. Gen. Laws, chap. 19, § 120.

155. Proceedings to investigate the affairs of a county.—A private person or an unincorporated association is entitled to be reimbursed by the county for reasonable costs and expenses in proceedings before the governor, instituted upon reasonable grounds, to remove a county officer. There is no need of an authorization by the attorney general. If the board of supervisors refuse to audit the claim the claimant may resort to either certiorari or mandamus proceedings.⁷⁴ Upon an appeal to the state board of tax commissioners from the equalization of assessments the board may allow for services of counsel a sum not exceeding \$2,000, and for disbursements, including the compensation and expense of a stenographer, a sum not exceeding \$1,000 in addition thereto.⁷⁵ Where costs on appeal from a tax equalization were ordered paid by the defeated party, and where it refused to levy taxes to pay the same, it was held that a mandamus was the proper proceeding to compel such levy.⁷⁶

⁷⁴*People ex rel. Smart v. Washington County*, 66 App. Div. 66, 72 N. Y. Supp. 568.

⁷⁵*People ex rel. Ulster County v. Kingston*, 101 N. Y. 82, 3 How. Pr. N. S. 452, 4 N. E. 348.

⁷⁶Gen. Laws, chap. 24, § 177.

Where a board of supervisors contracted with an attorney to pay \$1,200 in an appeal by a town to the state assessors from the equalization of the board of supervisors, and the state assessors certified the expenses of the respondent's attorney at \$500, this did not determine the amount which might be properly paid by the board of supervisors to their counsel for compensation on such appeal.⁷⁷

Upon a petition by a receiver of taxes to punish a taxpayer for nonpayment of a personal tax, where the taxpayer charges that the marshal never demanded taxes from him, which is not denied by the receiver, the court would, under Laws 1882, chap. 410, § 861, relieve him of costs of the proceedings.⁷⁸

156. Proceedings to vacate an assessment.— A proceeding to vacate an assessment is a special proceeding, and costs thereof similar to those in an action are in the discretion of the court, under § 3240 of the Code of Civil Procedure.⁷⁹

157. Proceedings under special acts.— Special acts in relation to laying out streets, etc., which contain no provision as to costs, are governed by the same section.⁸⁰ Where there are several defendants who are not united in interest, and who make separate defenses and require separate judgments, they are entitled to separate bills of costs.⁸¹ Under § 159 of the Village Law (Laws 1897, chap. 414, as amended by Laws 1901, chap. 68) the costs can be claimed by the owner as a matter of right, only after the appointment of commissioners to ascertain the amount of the damage. All costs incurred prior thereto are governed by § 3240 of the Code of Civil Procedure. When the court appoints commissioners, upon confirming the report of the referee, it can

⁷⁷*People ex rel. Anibal v. Fulton* ⁸⁰*Re Grade Crossing Comrs.* 17 County, 53 Hun, 254. 6 N. Y. Supp. App. Div. 54, 44 N. Y. Supp. 844. 591.

⁷⁸*Re McLean*, 62 Hun, 1, 41 N. Y. Dig. 466.
S. R. 897, 16 N. Y. Supp. 417.

⁷⁹*Re Protestant Episcopal Public School*, 86 N. Y. 396.

⁸¹*Re Eleventh Ave.* 14 N. Y. Week.

allow costs up to that time. If the order of confirmation is silent as to costs, none can be taxed for proceedings prior to the appointment of such commissioners.⁸²

⁸²*Bley v. Hamburg*, 84 App. Div. 23, 82 N. Y. Supp. 35.

CHAPTER XVI.

SPECIAL PROCEEDINGS CONTINUED.

158. Proceedings for appointment of a committee of a lunatic, idiot, habitual drunkard, or imbecile.
 - a.* Petition dismissed.
 - b.* Petition granted.
 - c.* Attempt by incompetent to have the committee removed.
 - d.* Allowance to and against committee.
159. Certiorari.
 - a.* In general.
 - b.* Proceedings against assessors.
 - c.* Amendment of certiorari.
 - d.* Additional allowance.
160. Habeas corpus.
161. Proceedings supplementary to execution.
 - a.* Statute.
 - b.* At what stage of the proceeding costs are granted.
 - c.* How costs are collected of judgment debtor.
 - d.* Costs granted to judgment debtor.
 - e.* Costs granted to third parties.
 - f.* Costs in proceedings to collect taxes.
162. Contempt proceedings.
 - a.* In general.
 - b.* In proceedings supplementary to execution.
163. Summary proceedings.
 - a.* Statute.
 - b.* Tender.
 - c.* Costs on appeal.
164. General assignment for the benefit of creditors.
 - a.* Allowance for legal services.
 - b.* Costs in actions to set aside assignment.
 - c.* Costs on contested claims.
 - d.* Costs in actions brought by assignee.
 - e.* Costs in an action for an accounting.
 - f.* Costs upon the final accounting.
 - g.* By whom costs of final accounting are paid.
 - h.* How costs against an assignee are collected.
165. Assignee or trustee in bankruptcy.
166. Writ of prohibition.
167. How costs on state writs are collected.
168. Removal of excise commissioners.

169. Proceedings to mortgage trust property.

170. Special proceedings before an officer.

171. Proceedings to discharge from imprisonment on execution.

171a. Proceedings to discover the death of a tenant for life.

158. Proceedings for appointment of a committee of a lunatic, idiot, habitual drunkard, or imbecile. *a. Petition dismissed.*—

Where a final order is made dismissing a petition the court may, in its discretion, award in the order a fixed sum as costs, not exceeding \$50, and disbursements, to be paid by the petitioner to the adverse party. Costs are not awarded against the unsuccessful petitioner, if he acted in good faith and upon probable cause;¹ but he will be compelled to bear his own expenses.²

b. Petition granted.—Where a committee of the property is appointed the court must direct the payment by him, out of the funds in his hands, of the necessary disbursements of the petitioner, and of such a sum for costs and counsel fees as it thinks reasonable; and it may, in its discretion, direct the committee to pay a sum not exceeding \$50 and disbursements to any adverse party.³ The attorney who appears for the person who is declared a lunatic is not limited to the sum of \$50 for his services in defending the proceeding.⁴

If it is found that the alleged lunatic is of sound mind, then the court obtains no control over his property, and cannot charge the costs of the proceeding thereon: but after the jury has found that he was of unsound mind the court, upon confirming the inquisition, acquires complete jurisdiction over the lunatic and his property:⁵ and if the lunatic dies after the determination of the jury and before its confirmation the court, having acquired jurisdiction over the property of the lunatic, may direct the payment of the costs and disbursements of the proceeding.⁶

¹*Re McAdams*, 19 Hun, 293; *Re Clapp*, 20 How. Pr. 385; *Re Arnkout*, 1 Paige, 497; *Brower v. Giles*, 11 Paige, 638; *Re Arnkout*, 1 Fisher, 4 Johns. Ch. 441; Code Civ. Proc., § 2336.

²*Re Giles*, 11 Paige, 638.

³Code Civ. Proc., § 2336.

⁴*Re Hardy*, 26 App. Div. 164, 49 N. Y. Supp. 953.

⁵*Re Lofthouse*, 3 App. Div. 139, 74 N. Y. S. R. 468, 38 N. Y. Supp. 39.

By § 2323 of the Code of Civil Procedure, costs may be allowed, upon the appointment of a committee of an incompetent person who has been committed to a state institution, to the petitioner in a sum not exceeding \$25 besides the necessary disbursements, payable from the estate of the incompetent.

Upon the denial of an application to set the same aside, costs as of a motion may be allowed.

c. Attempt by incompetent to have the committee removed.—

The committee of a lunatic is authorized to pay counsel fees in defending a proceeding brought to have the lunacy proceeding set aside.⁷ The allowance thus made rests largely in the discretion of the court at special term, and this discretion will not usually be reviewed on appeal.⁸ There is no hard and fast rule concerning allowance out of the estate of the incompetent to attorneys for services rendered in an unsuccessful attempt to procure a supersedeas of a commission, where the inquiry is expressly sanctioned by the court, by ordering a reference to inquire into the mental condition of the incompetent person. If the proceeding is groundless or vexatious, and is supported by no probable cause, or is instituted in bad faith, or for the benefit of a third party, no costs should be allowed.⁹ If the estate is large the costs are properly allowed out of the estate.¹⁰ It is immaterial that the application is not made by the committee.¹¹ On the contrary, if the incompetent person has a small estate, all of which is required to support him and his family, the court will be averse to making an allowance out of the estate.¹² If the proceeding was instituted for the benefit of a third person the costs are properly chargeable against such third person.¹³ Costs

⁷*Re Clapp*, 20 How. Pr. 385.

⁸*Re Killick*, 4 Silv. Sup. Ct. 89;

26 N. Y. S. R. 763, 7 N. Y. Supp. 360.

⁹*Carter v. Beckwith*, 128 N. Y. 312, 40 N. Y. S. R. 343; *Re Beckwith*, 3

Hun, 443.

¹⁰*Re Tracy*, 1 Paige, 580.

¹¹*Re Larner*, 68 App. Div. 321, 74

N. Y. Supp. 70.

¹²*Re M'Lean*, 6 Johns. Ch. 440.

¹³*Re Folger*, 4 Johns. Ch. 169.

out of the estate of the incompetent will be denied to an attorney who had a personal interest in the proceeding.¹⁴

d. Allowance to and against committee.—Where a committee has employed an attorney the court has power to entertain an application of the attorney for payment, and order the committee to pay the value of the attorney's services.¹⁵ A committee who has been guilty of gross negligence will be charged with costs of proceedings for his removal, and to procure a settlement of his accounts.¹⁶ The matter of allowing counsel fees to the committee rests in the discretion of the court.¹⁷ The jurors are entitled to only 25 cents, with no *per diem* allowance.¹⁸

159. Certiorari. *a. In general.*—Costs not exceeding \$50 and disbursements may be allowed in the final order to either party in the discretion of the court.¹⁹ The order must specify the amount of costs. The clerk has no authority to tax costs, but the amount of costs must be fixed by the court.²⁰ Costs as of an action cannot be taxed under § 3240 of the Code of Civil Procedure, because the amount of costs is fixed by § 2143 of that Code. Nor does § 3258, subd. 1, or § 3251, which give public officers double costs, have any application to these proceedings.²¹

The costs, when allowed, should be taxed and inserted in the order.²² The costs upon a certiorari to review the comptroller's assessment of state taxes on corporations are governed by the Code of Civil Procedure, § 2143, because the statute which regulates the practice in such proceedings makes no special provision as to costs, and the general statute applies.

¹⁴*Re Van Cott*, 1 Paige, 489.

²⁰*People ex rel Hall v. Hempstead*,

¹⁵*Re Horton*, 18 Misc. 406. 42 N. Y. Supp. 775.

42 App. Div. 250. 59 N. Y. Supp. 10; *People ex rel. Green v. Smith*, 13

¹⁶*Re Carter*, 3 Paige, 146.

Hun. 227; *People ex rel. Smith v. Nelliston*, 79 N. Y. 638.

¹⁷*Re Killick*, 4 Silv. Sup. Ct. 89. 26 N. Y. S. R. 763. 7 N. Y. Supp. 360.

²¹*People ex rel. Hall v. Hempstead*,

¹⁸*Re Sanford*, 61 Hun. 33. 15 N. Y. Supp. 291; Code Civ. Proc. §§ 2333, 3313, 3314, 3316.

42 App. Div. 250. 59 N. Y. Supp. 10; *People ex rel. Donovan v. New York Fire Comrs.*, 5 Abb. N. C. 144.

¹⁹*People ex rel. Hall v. Hempstead*, 42 App. Div. 250, 59 N. Y. Supp. 10; Code Civ. Proc. § 2143.

²²*Re Brooklyn Bd. of Edu.* 19 N. Y. Civ. Proc. Rep. 420. 34 N. Y. S. R. 493. 11 N. Y. Supp. 780.

b. Proceedings against assessors.—Costs in proceedings by certiorari under chapter 24 of the General Laws are governed by § 254 of that act. This section is a re-enactment of §§ 6 and 7 of chapter 269 of the Laws of 1880, which substantially re-enacted chapter 270 of the Laws of 1854. Section 2143 of the Code of Civil Procedure does not apply.²³ If the relator is defeated, costs must be awarded against him not exceeding the costs and disbursements taxable in an action upon the trial of an issue of fact in the supreme court.²⁴

Assessors will not be charged with costs where a question of law has been submitted to them, and they have decided wrongly.²⁵ The presumption of law is that the officers intend to perform their duty honestly and conscientiously, and such presumption can only be overcome by clear evidence. This is not done by isolated cases that may be difficult to reconcile with a conscientious discharge of duty; but where, looking at the assessment as a whole, and considering the difficulty of assessing peculiar property, the result is good, costs will not be awarded against them.²⁶ Their dereliction must be clear before they will be compelled to pay costs.²⁷

Assessors will be charged personally with costs, when they have all the facts before them and the true rule of law given them, and then assess the property at a grossly excessive sum.²⁸

²³*People ex rel. Fairfield Chemical Co. v. Coleman*, 18 Abb. N. C. 246; *People ex rel. Niagara Falls Hydraulic Power & Mfg. Co. v. Russell*, 57 Hun. 53, 32 N. Y. S. R. 20, 10 N. Y. Supp. 391; *People ex rel. Lee v. College Point*, 89 Hun. 194, 68 N. Y. S. R. 878, 34 N. Y. Supp. 1145, seems to have been decided without the attention of the court being drawn to the fact that costs in certiorari against assessors are not governed by the general provisions as to costs in these proceedings contained in the Code of Civil Procedure.

²⁴Gen. Laws chap. 24, § 254.

²⁵*People ex rel. Canady v. Williams*, 90 Hun. 501, 71 N. Y. S. R. 401, 36 N. Y. Supp. 65.

²⁶*People ex rel. Walkill Valley R. Co. v. Keator*, 67 How. Pr. 277, Affirmed in 36 Hun. 592, 17 Abb. N. C. 369.

²⁷*People ex rel. Mann v. Covert*, 18 N. Y. Week. Dig. 458; *People ex rel. Raplee v. Reddy*, 43 Barb. 539; *People ex rel. Thurman v. Ryan*, 88 N. Y. 142, 42 Am. Rep. 238.

²⁸*People ex rel. Boston, H. T. & W. R. Co. v. Wilder*, 3 N. Y. S. R. 159.

They will be charged with costs where the court finds that they acted with gross negligence.²⁹ Where repeated adjudications had held that the property was exempt, and the assessors again assessed it, and appealed from the adverse decision against them, to the court of appeals, and, while the case was pending there, again placed it on the tax roll, they were properly chargeable with bad faith, and should be compelled to pay costs personally.³⁰ Where assessors assessed, in 1900, property that was declared exempt in 1898, and one of the board of 1900 was on the board in 1898, costs of a writ of certiorari are properly allowed against them.³¹ In the absence of a holding at special term or by the appellate division that the action of the assessors was grossly negligent or in bad faith or with malice, no costs can be allowed against them.³²

The immunity that the assessors possess at special term with regard to costs does not apply upon an appeal taken by them from an adverse decision, and, if defeated upon the appeal, costs may, in the discretion of the court, be awarded against them the same as on an appeal from an order,—\$10.³³ If costs are awarded to assessors, either at special term or upon an appeal, they are entitled to increased costs under § 3258 of the Code of Civil Procedure, because these costs are regulated by § 3251, and not by § 2143. The party claiming such costs should apply

²⁹*People ex rel. Warren v. Carter*, S. R. 207, 25 N. Y. Supp. 393, Affirmed in 141 N. Y. 118, 23 L. R. A. 23 N. E. 927.

³⁰*People ex rel. Dowd v. Fonda*, 22 N. Y. Week. Dig. 477.

³¹*People ex rel. Delta Kappa Epsilon Soc. v. Lawlor*, 36 Misc. 594, 73 N. Y. Supp. 1082.

³²*People ex rel. Niagara Falls Hydraulic Power & Mfg. Co. v. Russell*, 57 Hun. 53, 32 N. Y. S. R. 20, 10 N. Y. Supp. 391; *People ex rel. Mann v. Peterson*, 31 Hun. 421; *People ex rel. Ogdensburgh & L. C. R. Co. v. Pond*, 13 Abb. N. C. 1; *People ex rel. Lorillard v. Barker*, 55 N. Y.

³³*Re Pryor*, 67 App. Div. 316, 73 N. Y. Supp. 961; *People ex rel. Smith v. New York T. & A. Comrs.* 101 N. Y. 651, 4 N. E. 752; *People ex rel. Warren v. Carter*, 46 Hun. 444; *People ex rel. Oak Hill Cemetery Assn. v. Pratt*, 66 Hun. 578, 50 N. Y. S. R. 355, 21 N. Y. Supp. 853. Affirmed in 138 N. Y. 655, 53 N. Y. S. R. 931, 34 N. E. 513; *People ex rel. Smith v. Asten*, 1 N. Y. S. R. 37; *People ex*

to the court for a certificate directing the clerk to tax the increased costs.³⁴ Costs must be awarded upon denying the petition.³⁵ Costs upon appeal against others than assessors are in the discretion of the court, and when awarded they are the same as upon an appeal from a judgment in an action.³⁶ Upon appeals from a certiorari against the assessors the costs are not governed by the provisions of the Code of Civil Procedure, but under § 255 of chapter 24 of the General Laws, which makes appeals the same as appeals from orders; and therefore costs are governed by § 3239 of the Code of Civil Procedure.³⁷

c. Amendment of certiorari.—Relators should be allowed to amend the certiorari after a return is filed upon the payment of costs.³⁸ At common law, costs were not allowed upon certiorari, either at special term,³⁹ or on appeal.⁴⁰

d. Additional allowance.—Under § 3253 of the Code of Civil Procedure an additional allowance may be granted, except in the first and second judicial districts, in certiorari to review assessments.

160. Habeas corpus.—Costs are not allowed in habeas corpus proceedings of a criminal nature,⁴² except where the prisoner is

rel. Wallkill Valley R. Co. v. Keator, 803; *People ex rel. Oak Hill Cemetery v. Pratt*, 66 Hun, 578, 50 N. Y. S. R. 355, 21 N. Y. Supp. 853.

ex rel. Western U. Teleg. Co. v. Dolan, 126 N. Y. 166, 179, 12 L. R. A. 251, 27 N. E. 269; *People ex rel. Bleeker Street & F. F. R. Co. v. Barker*, 90 Hun, 253, 70 N. Y. S. R. 264, 35 N. Y. Supp. 803.

³⁴ Code Civ. Proc. § 3248.
³⁵ Gen. Laws, chap. 24, § 254; *People ex rel. Rome, W. & O. R. Co. v. Jones*, 43 Hun, 131, 6 N. Y. S. R. 112, 25 N. Y. Week. Dig. 487.
³⁶ Code Civ. Proc. § 3240; *Wood v. Randolph*, 9 Misc. 507, 61 N. Y. S. R. 80, 30 N. Y. Supp. 344; *People ex rel. Shelton v. Gower*, 44 How. Pr. 26.

³⁷ *People ex rel. Cook v. Board of Police*, 17 Abb. Pr. 324, note, 26 How. Pr. 450. *Contra, People ex rel. Muller v. Schodack Highway Comrs.* 27 How. Pr. 158.
³⁸ *People ex rel. Kilmer v. Chertree*, 5 N. Y. Week. Dig. 65; *People ex rel. Smith v. Nelliston*, 79 N. Y. 638, 9 N. Y. Week. Dig. 298.

³⁹ *People ex rel. Van Riper v. New York Catholic Protectory*, 106 N. Y. 604, 27 N. Y. Week. Dig. 260, 5 N. Y. Crim. Rep. 499, 11 N. Y. S. R. 155, 13 N. E. 435.
⁴⁰ *People ex rel. Bleeker Street & F. F. R. Co. v. Barker*, 90 Hun, 253, 70 N. Y. S. R. 264, 35 N. Y. Supp.

released and an appeal is taken in the name of the people, under § 2059 of the Code of Civil Procedure; then costs upon affirmance should be paid by the county. Such costs are \$50 and disbursements.⁴³ But in a civil special proceeding, costs and disbursements as in an action may be awarded in the discretion of the court.⁴⁴ The costs should embrace only the items for proceedings after petition and before trial, and for trial and disbursements.⁴⁵ Where the matter is disposed of upon a demurrer interposed to the return of the sheriff, the proceedings are analogous to the trial of an issue of law, and a similar trial fee is proper. Costs before notice of trial should not be allowed, as there is no notice of trial of the demurrer or anything resembling such notice.⁴⁶ In the final order the facts must be set forth which show that the amount fixed by the order is properly chargeable.⁴⁷ Upon an appeal from an order granted at special term, denying the application of counsel upon a habeas corpus that failed, for an allowance out of the property of the person in whose behalf the proceeding was instituted for services therein, on the ground that the proceeding was instituted in bad faith, or, at least, without authority, the appellate division, upon reversing the order of the special term, should not allow the amount claimed, but should send the matter back to the special term to inquire into the necessity or propriety of the proceeding, the right of counsel to compensation, and the reasonableness of the charges.⁴⁸ A defendant cannot be charged with costs until he has had a full, fair, patient, and impartial hearing.⁴⁹

⁴³ Code Civ. Proc. § 3240; *People ex rel. Sinkler v. Terry*, 42 Hun. 273, 5 N. Y. S. R. 121, 25 N. Y. Week. Dig. 307.

⁴⁴ Code Civ. Proc. § 3240; *Re Barnett*, 11 Hun. 468, 53 How. Pr. 247; *Re Teese*, 32 App. Div. 46, 6 N. Y. Anno. Cas. 149, 52 N. Y. Supp. 517; *People ex rel. Oprandy v. Ciarcia*, 49 App. Div. 90, 63 N. Y. Supp. 497.

⁴⁵ *Re Barnett*, 11 Hun. 468, 53 How. Pr. 247; *Muller v. Bowe*, 4 Month. L. Bull. 10.

⁴⁶ *McMaster's Estate*, 14 N. Y. Civ. Proc. Rep. 195, 16 N. Y. S. R. 240, 1 N. Y. Supp. 225; *Re Bernhard*, 14 N. Y. Civ. Proc. Rep. 195, 16 N. Y. S. R. 240, 1 N. Y. Supp. 225.

⁴⁷ *Re Teese*, 32 App. Div. 46, 6 N. Y. Anno. Cas. 149, 52 N. Y. Supp. 517.

⁴⁸ *Re Larner*, 170 N. Y. 7, 62 N. E. 761.

⁴⁹ *People ex rel. Watson v. Boffett*, 75 App. Div. 365, 78 N. Y. Supp. 175.

161. Proceedings supplementary to execution *a. Statute.*---

The costs allowed in these proceedings are regulated by §§ 2455 and 2456 of the Code of Civil Procedure.

b. At what stage of the proceeding costs are granted.—The application for an allowance of costs cannot be made until the proceeding has been brought to an end in favor of the party applying for them.⁵⁰ But it may be made without notice.⁵¹ The judge is authorized to make this allowance if any property is found in the hands of the judgment debtor.⁵² He may make this allowance at any time before the final order for the application of the funds in the hands of the receiver.⁵³

Sections 2455 and 2456 of the Code of Civil Procedure relate to the costs of a proceeding, and not to the costs of a motion to dismiss them.⁵⁴ Costs may be allowed against the judgment debtor upon a proceeding based on a third party order,⁵⁵ or upon an order directed to the judgment debtor, when the judgment debtor pays the amount due and there is no examination.⁵⁶ It is not fatal to the allowance that the amount is allowed for "counsel fee" instead of for "costs."⁵⁷ The attorney for the judgment creditor has no lien upon the costs till they are allowed. If the judgment debtor settles in full with the judgment creditor, no costs can be allowed.⁵⁸ Nor can the costs be allowed where the judgment is collected by a second execution, issued subsequent to the institution of such a proceeding.⁵⁹

⁵⁰*Davis v. Turner*, 4 How. Pr. 190. Proc. Rep. 139, 33 N. Y. S. R. 27.

⁵¹*Serven v. Lowerre*, 3 Misc. 113, 11 N. Y. Supp. 682.
22 N. Y. Supp. 1052.

⁵⁶*Colne v. Girard*, 19 Abb. N. C.

⁵²*Kearney's Case*, 13 Abb. Pr. 459, 288.

22 How. Pr. 309.

⁵⁷*Hulsaver v. Wiles*, 11 How. Pr.

⁵³*Webber v. Hobbie*, 13 How. Pr. 446.
382.

⁵⁸*Paterson Bros. v. Goorley*, 14

⁵⁴*Hutson v. Weld*, 38 Hun. 142; Misc. 56, 69 N. Y. S. R. 651, 35 N. Valiente v. Bryan, 3 N. Y. Civ. Proc. Y. Supp. 297.

Rep. 358, 66 How. Pr. 302.

⁵⁹*Ritter v. Grcason*, 28 Misc. 656.

⁵⁵*Grinnell v. Sherman*, 19 Civ. 59 N. Y. Supp. 1053.

c. How costs are collected of judgment debtor.—Section 2455 of the Code of Civil Procedure provides that the order granting costs must direct their payment out of any money that has come, or may come, into the hands of the receiver or of the sheriff; or, within a time specified in the order, by the judgment debtor or other person against whom the special proceeding is instituted. It has been held that the establishment of a method of collection impliedly precludes their collection in any other way. They are not motion costs, and, therefore, are not collectable by execution.⁶⁰ Costs may be collected by contempt proceedings, although after the granting of the costs the judgment is satisfied by payment to the sheriff upon execution.⁶¹

Upon the reversal by the appellate division of an order adjudging the judgment debtor in contempt, he is entitled to tax but \$10 costs.⁶²

An appeal does not lie from such an order to the court of appeals.⁶³

d. Costs granted to judgment debtor.—Where the proceedings have been dismissed because the affidavit is fatally defective, motion costs to the defendant are proper.⁶⁴ These costs are not allowed under § 2456 of the Code of Civil Procedure, as that only applies to a case when the judgment debtor has been examined.⁶⁵ A creditor who has not been guilty of bad faith should not be compelled to pay money to his debtor, but the costs allowed to the judgment debtor should be credited on the judgment.⁶⁶ Costs may be allowed to the judgment debtor when the creditor finds no property, and has tried and failed to have the judgment debtor adjudged guilty of contempt.⁶⁷

⁶⁰*Valiente v. Bryan*, 3 N. Y. Civ. Proc. Rep. 358, 66 How. Pr. 302.

⁶¹*Holton v. Robinson*, 59 App. Div. 45, 69 N. Y. Supp. 33.

⁶²*Jones v. Sherman*, 18 Abb. N. C. 461, 11 N. Y. Civ. Proc. Rep. 416, 8 N. Y. S. R. 344.

⁶³*Crosby v. Stephan*, 97 N. Y. 606. S. 372.

⁶⁴*Hutson v. Weld*, 38 Hun. 142, 22 N. Y. Week. Dig. 572.

⁶⁵*Engle v. Bonneau*, 2 Sandf. 679; *Simms v. Frier*, 2 Month. L. Bull. 97.

⁶⁶*Kress v. Morehead*, 26 N. Y. Week. Dig. 410, 8 N. Y. S. R. 858.

⁶⁷*Boelger v. Sivil*, 1 How. Pr. N.

e. Costs granted to third parties.—Costs should be allowed to a third party, when he has been examined, and no property has been found,⁶⁸ unless the judgment creditor can show good reason for the examination.⁶⁹ The judgment creditor can avoid this liability by examining the third party as a witness in a proceeding directed against the judgment debtor.

Sections 2456, 2555 of the Code of Civil Procedure relate to the costs of the proceeding, and have nothing to do with the costs of motion and the appeals from orders, which come under the general law.⁷⁰

f. Costs in proceedings to collect taxes.—Under Laws 1896, chap. 908, § 259, no costs can be allowed against the officer or corporation seeking to enforce the collection of taxes by supplementary proceedings. But this does not apply to an appeal by the tax officer from an order which dismisses his proceedings. The order thus made was a final order, and costs would be awarded as in an action were it not for the provision of § 254 of the statute, which makes the amount of costs upon any appeal from any order taken under that article (art. 11) the same as the costs upon an appeal from an order.⁷¹

162. Contempt proceedings. *a. In general.*—Costs in these proceedings are the same as costs in an action, and are governed by § 3240 of the Code of Civil Procedure.⁷² In proceedings to punish for contempt, where the party acted in good faith the only costs that can be taxed against him are motion costs and disbursements.⁷³ But no costs are allowed in proceedings for

⁶⁸*Sloane v. Higgins*, 2 Month. L. Bull. 11.

⁷¹*Re Pryor*, 67 App. Div. 316, 73 N. Y. Supp. 961.

⁶⁹*Anonymous*, N. Y. Code Rep. N. S. 113, 3 Sandf. 725; *Anonymous*, 11 Abb. Pr. 108.

⁷⁰*People ex rel. Scudder v. Cooper*, 10 N. Y. Week. Dig. 77; *Jones v. Sherman*, 18 Abb. N. C. 461, 11 N. Y. Civ. Proc. Rep. 416, 8 N. Y. S. R. 344; *Hutson v. Weld*, 38 Hun, 142, 22 N. Y. Week. Dig. 572.

⁷²Code Civ. Proc. § 3240; *McLean v. Jephson*, 26 Abb. N. C. 40, note, 13 N. Y. Supp. 834.

⁷³*Power v. Athens*, 19 Hun, 165; *People ex rel. Scudder v. Cooper*, 20 Hun, 486.

criminal contempt.⁷⁴ A person in contempt may be fined the amount of counsel fees and disbursements in the proceedings to punish him for contempt.⁷⁵ But the amount must be proved before the referee or court.⁷⁶ The Revised Statutes were the same as the Code of Civil Procedure.⁷⁷

b. In proceedings supplementary to execution.—A judgment debtor may be fined the amount of money that he has paid out in disregard of the order, and, in addition, the costs of the supplementary proceedings and motion costs.⁷⁸ Upon the refusal of the court to adjudge the judgment debtor guilty of contempt, it may allow him his disbursements and costs of motion to be discharged and acquitted of the alleged contempt.⁷⁹ The costs on a reversal of an order directing a commitment for contempt are but \$10 and disbursements.⁸⁰

163. Summary proceedings. *a. Statute.*—Costs in these proceedings are regulated by § 2250 of the Code of Civil Procedure, which is as follows: “Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter 21 of this act, must be at the rate allowed by law in an action in a justice’s court, and are limited in like manner, unless the application is founded upon an allegation of forcible entry or forcible holding out, in which case the judge or justice may award to the successful party a fixed sum as costs, not exceeding \$50, in addition to his disbursements. If the final order is made by a county judge, or

⁷⁴*People ex rel. New York Soc. for Prevention of Cruelty to Children v. Gilmore*, 88 N. Y. 626. Abb. N. C. 114, 19 N. Y. S. R. 231, 2 N. Y. Supp. 763; *Boon v. McGucken*, 67 Hun. 251, 23 N. Y. Civ. Proc. Rep. 115, 50 N. Y. S. R. 901, 22 N. Y. Supp. 424.

⁷⁵*People ex rel. Woolf v. Jacobs*, 66 N. Y. S.

⁷⁶*Brett v. Brett*, 33 Hun. 547; *People ex rel. Lawyer’s Surety Co. v. Anthony*, 7 App. Div. 132, 40 N. Y. Supp. 279; Code Civ. Proc. §§ 2284, 2289, 2290.

⁷⁷*Sudlow v. Knox*, 7 Abb. Pr. N. S. 419; *Fenton v. Dempsey*, 50 Hun. 131, 15 N. Y. Civ. Proc. Rep. 393, 22

⁷⁸*Fitzsimmons v. Ryan*, 64 App. Div. 404, 72 N. Y. Supp. 65.

⁷⁹*Rhodes v. Linderman*, 17 N. Y. Supp. 628.

⁸⁰*Jones v. Sherman*, 18 Abb. N. C. 461, 11 N. Y. Civ. Proc. Rep. 416, 8 N. Y. S. R. 344.

a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a justice of the peace. In every other case an execution may be issued to collect the costs awarded thereby, as if the final order was a judgment rendered in the court of which the judge or justice is the presiding officer." The costs allowed in a justice's court are fixed by § 3076, subd. 2, at the sum of \$10.⁸¹

b. Tender.—There is no provision in the statute for a tender in these proceedings.⁸²

c. Costs on appeal.—A tenant who, upon appeal secures a reversal of an order recovered in a justice's court in favor of the landlord, is entitled to costs, as of course.⁸³ Section 2260 of the Code of Civil Procedure provides that an appeal may be taken from a final order with like effect as an appeal from a judgment. Subdivision 4 of § 3066 of the Code of Civil Procedure gives costs, as of course, upon an appeal from a judgment, where the judgment is reversed. But where the proceeding is instituted in a court of record the costs on appeal are in the discretion of the court, under § 3240 of the Code of Civil Procedure.⁸⁴

Upon an appeal from a final order rendered in justice's court in a case of forcible entry and detainer the defendant must pay the judgment recovered by the landlord, in order to take an appeal to the county court. This payment is jurisdictional, and not a mere irregularity.⁸⁵

164. General assignment for the benefit of creditors. *a. Allowance for legal services.*—Allowances for legal services in these

⁸¹*Lauria v. Capobianco*, 39 Misc. 7 N. Y. Civ. Proc. Rep. 112; *Garrison v. Marie*, 7 N. Y. Civ. Proc. Rep. 441. 80 N. Y. Supp. 203.

⁸²*Storer v. Chasse*, 9 Misc. 45, 59 113. 1 How. Pr. N. S. 348. N. Y. S. R. 671, 29 N. Y. Supp. 291.

⁸³*Lewis v. Hoffman*, 5 N. Y. Civ. Proc. Rep. 141.

⁸⁴*Harrison v. Swart*, 34 Hun, 259.

⁸⁵*Everall v. Lassen*, 13 Daly, 10,

proceedings are made to the assignee, and not to the attorney.⁸⁶ The assignee is personally responsible to his attorney for the value of his services. He should pay his attorney and then ask the court to reimburse him, the same as for any other disbursement.⁸⁷ If the attorney's work is worthless or fraudulent against the estate, no allowance will be made therefor.⁸⁸ The assignee who is an attorney cannot be allowed anything for himself or for the members of his firm for services in protecting the estate.⁸⁹ But where the only appealing creditor did not object to the allowance below, the appellate court will not disturb the allowance.⁹⁰ The sum of \$25 was held a proper charge for drawing an assignment.⁹¹ Where the assignee is an attorney, he will not be allowed fees of counsel to advise him, unless special complications or difficulties require it.⁹² But where complicated questions arise the assignee may be allowed counsel fees.⁹³ A general assignee for the benefit of creditors is a trustee of an express trust within the meaning of § 3246 of the Code of Civil Procedure.⁹⁴

b. Costs in actions to set aside assignment.—An assignee for the benefit of creditors is bound to defend an action brought to set aside the assignment, unless he is personally acquainted with the fraud for which the assignment was set aside. In the event of his defeat, his knowledge of the fraud not being proved, he will not be charged with costs,⁹⁵ but will be allowed counsel fees

⁸⁶*Re Worthly*, 10 Daly, 12.

Lery, 1 Abb. N. C. 177. *Contra*, *Re*

⁸⁷*Re Reynolds*, 30 Misc. 397, 62 N. Y. Supp. 515; *Re Ludeke*, 22 Misc. 13 Daly, 181.

⁸⁸*Re Scott*, 52 How. Pr. 441; *Re*

⁸⁹*Re Lerentrith*, 40 App. Div. 429, 58 N. Y. Supp. 256.

Burbank, 65 How. Pr. 129.

⁹⁰*Re Clute*, 14 App. Div. 234, 43 N. Y. Supp. 573; *Winn v. Crosby*, 52 How. Pr. 174; *Re Maxwell*, 66 Hun, 151, 49 N. Y. S. R. 154, 21 N. Y. Supp. 209.

⁹¹*Re Friend*, 23 Misc. 300, 50 N. Y. Supp. 954; *Lery's Accounting*, 1

⁹²*Re Johnson*, 10 Daly, 151, 49 N. Y. S. R. 154, 21 N. Y. Supp. 209.

⁹³*Faxon v. Mason*, 76 Hun, 408, 59

⁹⁴*Re Van Horn*, 10 Daly, 131; *Re* N. Y. S. R. 328, 27 N. Y. Supp. 1025;

and disbursements.⁹⁶ The fact that the assignor confessed judgment to the assignee for a spurious debt, which judgment was made a preferred claim in the assignment, is not such fraud as to charge the assignee with costs, where he repudiated the judgment and informed the creditors that he had no claim.⁹⁷ Nor is it fraud for the assignee to allow the assignor to occupy a small portion of the assigned property, so as to charge the assignee with costs in an action to set aside the assignment.⁹⁸ An assignee who is a party to a fraud for which the assignment is set aside will not be allowed either costs or disbursements, and should be charged with costs and expenses of the accounting.⁹⁹ The assignee will be allowed his costs and disbursements in his successful defense of an action to set aside the assignment.¹⁰⁰ If the assignee insists upon retaining his costs and disbursements in his unsuccessful defense of the assignment, he is properly charged with all the costs necessarily incurred in the settlement of that question.¹⁰¹ An assignee who has unsuccessfully defended an assignment to him cannot be granted an allowance against the successful creditor.¹⁰² But where the creditor consents, such an allowance can be made in spite of the objection of the assignor.¹⁰³

c. Costs on contested claims.—An assignee who defends a claim in good faith will be allowed his disbursements and counsel fee,¹⁰⁴ even if defeated.¹⁰⁵ But if the assignor, in good faith,

Durant v. Pierson, 19 N. Y. Civ. 27 N. Y. Supp. 787; *Dexter v. Adler*, Proc. Rep. 203, 33 N. Y. S. R. 207, 76 Hun. 439, 27 N. Y. Supp. 1121; 12 N. Y. Supp. 145. *Mayer v. Hazard*, 49 Hun, 222, 17

⁹⁶*Dorney v. Thacher*, 76 Hun. 361, N. Y. S. R. 26, 1 N. Y. Supp. 680. 58 N. Y. S. R. 466, 27 N. Y. Supp. 787. ¹⁰³*Faxon v. Mason*, 90 Hun, 426, 70 N. Y. S. R. 624, 35 N. Y. Supp. 950.

⁹⁷*Webb v. Daggett*, 2 Barb. 9. ¹⁰⁴*Re Talcott*, 3 App. Div. 578, 73 N. Y. S. R. 809, 38 N. Y. Supp. 338;

⁹⁸*Webb v. Daggett*, 2 Barb. 9. *Re Barr*, 6 Misc. 526, 56 N. Y. S. R. 742, 27 N. Y. Supp. 416; *People ex*

⁹⁹*Smith v. White*, 27 N. Y. S. R. 227, 7 N. Y. Supp. 373. *rel. Olin v. Lockwood*, 9 Daly. 68; *Re Clute*, 14 App. Div. 234, 43 N. Y. Supp. 573.

¹⁰⁰*Re Barnes*, 4 Misc. 136, 53 N. Y. S. R. 119, 23 N. Y. Supp. 600. ¹⁰⁵*Re Risley*, 10 Daly, 44. 17 N. Y. S. R. 26, 1 N. Y. Supp. 680.

¹⁰¹*Mayer v. Hazard*, 49 Hun, 222, 17 N. Y. S. R. 26, 1 N. Y. Supp. 680. ¹⁰²*Dorney v. Thacher*, 76 Hun, 361,

has included the claim in his schedule of debts, the assignee would not be justified in contesting it.¹⁰⁶ In any event the assignee must prove the value of the services of his attorney.¹⁰⁷ Upon a reference of a disputed claim the successful party is entitled to costs,¹⁰⁸ and an extra allowance in a proper case.¹⁰⁹

An assignee should not be allowed a retaining fee paid to his own regular attorney, as that is supposed to remunerate counsel for being deprived of the opportunity of rendering services to the other party.¹¹⁰ An attorney for the assignee, who purchases claims of creditors at a discount, will only be allowed, upon the accounting, the amount he paid for them, with interest thereon. If he had purchased them for the benefit of the estate, he might be granted an allowance for his services in purchasing them.¹¹¹

Where the assignee defends a suit unsuccessfully the court upon the final accounting may charge him personally with costs, if it finds that he was guilty of misconduct in conducting the defense.¹¹² An assignee has been granted an allowance in excess of his commissions and taxable costs, when he defends in good faith an action brought to recover trust funds that the assignor has deposited in the bank in his own name.¹¹³

d. Costs in actions brought by assignee.—An assignee for the benefit of creditors must bring his action in his representative capacity, if he would escape personal liability for costs. If he sues without alluding to his representative capacity, he will be liable personally.¹¹⁴ An assignee for the benefit of creditors is not personally liable for costs, where he has no assets in his

¹⁰⁶*Re Levy*, 1 Abb. N. C. 177.

¹¹⁰*Re Schaller*, 10 Daly, 57; *Re Van*

¹⁰⁷*Re Johnson*, 10 Daly, 123; *Re Horn*, 10 Daly, 131.

Hulbert, 10 Abb. N. C. 284.

¹¹¹*Re Dwight*, 61 App. Div. 357, 70

¹⁰⁸*Re Atwood*, 3 App. Div. 578, 73

N. Y. Supp. 563.

N. Y. S. R. 809, 38 N. Y. Supp. 338.

¹¹²*Re Dorr*, 4 N. Y. Supp. 754.

¹⁰⁹*Re Fairchild*, 10 Daly, 74; *Re*

¹¹³*English Bank v. Barr*, 31 Abb.

Risley, 10 Daly, 44; *Re Schaller*, 62

N. C. 7.

How. Pr. 40; *Re Barr*, 6 Misc. 526,

¹¹⁴*Murray v. Hendrickson*, 1 Bosw.

56 N. Y. S. R. 742, 27 N. Y. Supp.

635, 6 Abb. Pr. 96; *Carnahan v.*

116.

Pond, 15 Abb. Pr. 194.

hands, but is assured by the assignor that the defendant owes the amount for which the action is brought.¹¹⁵ An assignee is personally liable for costs in an action brought by him as such, where the defendant successfully attacks the assignment, which is declared void. There being no trust, he cannot bring his action as trustee.¹¹⁶ An assignee will also be allowed reasonable counsel fees, incurred in protecting the estate.¹¹⁷ An assignee must be guilty of mismanagement or bad faith in order to be charged with costs personally.¹¹⁸ It is not evidence of bad faith that the assignee prosecutes an action in spite of the fact that the opposing party claims that the contract is tainted with usury, or the fact that he has paid out all the money he has received to his attorney. That question will come up on the final accounting.¹¹⁹ Where the court charges him with costs, as assignee, it impliedly determines that he is not liable personally, and that decision cannot be attacked collaterally.¹²⁰

e. Costs in an action for an accounting.—In an action against an assignee for an accounting he will be allowed his costs, unless he is guilty of neglect or fraud. He would be compelled to come into court for his voluntary accounting.¹²¹

A creditor who brings such an action cannot compel other creditors to share in the expense of the suit before they can share in the fund.¹²² An assignee will not be allowed costs where his acts are open to suspicion, although the suspicion is groundless. A creditor is justified in calling an assignee into court where the property is sold in bulk, for an apparently inadequate price and without notice to creditors.¹²³ Proceedings taken by cred-

¹¹⁵*Cunningham v. McGregor*, 12 How. Pr. 305, 5 Duer, 648.

¹¹⁶*Sibell v. Remsen*, 30 Barb. 441, Affirmed in 29 How. Pr. 574.

¹¹⁷*Dorney v. Thacher*, 76 Hun, 361, 27 N. Y. Supp. 787; *Faxon v. Mason*, 90 Hun, 426, 35 N. Y. Supp. 950; *Voges v. Blakeman*, 6 N. Y. 579.

¹¹⁸ Code Civ. Proc. § 3246.

¹¹⁹*Jack v. Robie*, 48 Hun, 181, 15 N. Y. S. R. 605.

¹²⁰*Jack v. Robie*, 48 Hun, 181, 15 N. Y. S. R. 605.

¹²¹*Duffy v. Duncan*, 32 Barb. 587, Affirmed in 35 N. Y. 187.

¹²²*Lewis v. Hake*, 42 Hun, 542, 4 N. Y. S. R. 676.

¹²³*Price v. Mapes*, 28 N. Y. S. R. 88.

itors or other interested parties are special proceedings, and § 779 of the Code of Civil Procedure applies. Motion costs may be granted, and if they are not paid, further proceedings will be stayed until they are paid.¹²⁴

f. Costs upon the final accounting.—An allowance for services rendered by an attorney for the assignee upon the accounting may be allowed, but none can be made to the attorney of a creditor.¹²⁵

An assignee will not be allowed a counsel fee for preparing schedules, for general advice and consultation.¹²⁶ The assignee is allowed, upon an accounting, the same costs as would be allowed upon the trial of an issue of fact.¹²⁷ But no allowance can be made for costs before notice of trial or trial fee, where no objections to the account are filed.¹²⁸ No allowance will be made to the assignee when he has been defeated upon all the material issues.¹²⁹ These costs should be taxed after notice to all parties.¹³⁰

g. By whom costs of final accounting are paid.—The costs of an accounting are usually borne by the trust fund; but if the assignee desires to be relieved for his own convenience, he must bear the expenses.¹³¹ He may also be charged with the expense of an accounting, when he has been guilty of bad faith.¹³²

7 N. Y. Supp., 747. Affirmed without opinion in 132 N. Y. 552.

¹²⁴*Re Thorn*, 10 Daly, 71; *Re Apington*, 26 Abb. N. C. 69, 33 N. Y. S. R. 657, 11 N. Y. Supp. 563.

¹²⁵*Re Watt*, 10 Daly, 11.

¹²⁶*Re Levy*, 1 Abb. N. C. 182; *Re Wolff*, 13 Daly, 481. Affirmed in 102 N. Y. 741; *Re Ludeke*, 22 Misc. 676, 50 N. Y. Supp. 952; *Re Friend*, 23 Misc. 300, 50 N. Y. Supp. 954; *Re Johnson*, 10 Daly, 123; *Re Carrick*, 13 Daly, 181; *Re Wolf*, 1 N. Y. S. R. 273; *Mayer v. Hazard*, 49 Hun. 222, 17 N. Y. S. R. 26, 1 N. Y. Supp. 680; *Re Bowlby*, 34 Misc. 311, 69 N. Y. Supp. 783.

¹²⁷*Re Rauth*, 10 Daly, 52; *Re Schaller*, 62 How. Pr. 40.

¹²⁸*Re Vieu*, 29 Misc. 161, 60 N. Y. Supp. 175.

¹²⁹*Re Pool*, 8 Misc. 284, 59 N. Y. S. R. 214, 28 N. Y. Supp. 707.

¹³⁰*Re Bowlby*, 34 Misc. 311, 69 N. Y. Supp. 783.

¹³¹*Re Edwards*, 10 Daly, 68; *Re Rauth*, 10 Daly, 52; *Re Elmore*, 10 Daly, 48.

¹³²*Hynes v. Campbell*, 60 Hun. 391, 39 N. Y. S. R. 874, 15 N. Y. Supp. 506; *Smith v. White*, 27 N. Y. S. R. 227, 7 N. Y. Supp. 373.

Creditors who have succeeded in having an assignee removed cannot be granted an allowance out of the fund.¹³³

h. How costs against an assignee are collected.—A general assignee who is liable for costs in his representative capacity may be proceeded against the same as anyone else. An execution may issue, as of course, requiring the sheriff to satisfy it out of the trust property of the judgment debtor. If this execution is returned unsatisfied the creditor may maintain supplementary proceedings thereon; but the affidavit therein must show the return unsatisfied of an execution requiring satisfaction out of the trust estate. Merely describing the judgment debtor as assignee is not sufficient.¹³⁴

165. Assignee or trustee in bankruptcy.—A trustee in bankruptcy is a trustee of an express trust within the meaning of § 3246 of the Code of Civil Procedure.¹³⁵ Under the former bankruptcy law a bankrupt obtained judgment in an action brought by him, and then went into bankruptcy. His assignee argued the appeal. The case was sent back for a new trial and the assignee refused to have anything to do with the case, and so notified the bankrupt. The complaint was dismissed with costs. It was held that none of the costs could be collected of the assignee, because at the time of the commencement of the bankruptcy proceeding the costs did not constitute a debt, nor were they provable as such; and that the judgment was not affected by the discharge in bankruptcy, but could, after such discharge, be collected from the bankrupt.¹³⁶

A trustee who brings an action for a conversion which occurred after he had taken possession of the estate is liable personally for costs in case he is defeated, because he could have brought the action in his personal capacity.¹³⁷

¹³³*Re Manahan*, 10 Daly, 39; *Moore v. Jenkins*, 5 Month. L. Bull. 70. ¹³⁶*Heather v. Neil*, 14 N. Y. Week. Dig. 46.

¹³⁴*Felt v. Dorr*, 16 N. Y. Week. Dig. 385. ¹³⁷*Bedell v. Barnes*, 29 Hun, 589, 17 N. Y. Week. Dig. 312.

¹³⁵*Reade v. Waterhouse*, 52 N. Y. 587.

A trustee in bankruptcy is not liable for costs because after the commencement of the action an act of Congress was passed which deprived state courts of their jurisdiction.¹³⁸

166. Writ of prohibition.— Costs upon a writ of prohibition are regulated by § 2100 of the Code of Civil Procedure, which is as follows: “Where a final order is made in favor of the relator, it must award an absolute writ of prohibition; and it may also direct that all proceedings or any specified proceeding theretofore taken in the action, special proceeding, or matter, as to which the prohibition absolute issues, be vacated and annulled. The writ of consultation is abolished. Where a final order is made against the relator, it must authorize the court or judge, and the adverse party, to proceed in the action, special proceeding, or matter, as if the alternative writ had not been issued. Costs not exceeding \$50 and disbursements may be awarded to either party as upon a motion.”

167. How costs on state writs are collected.— Section 2007 of the Code of Civil Procedure is as follows: “For nonpayment, upon demand, of the costs awarded by a final order made in a special proceeding instituted by state writ, except where a peremptory writ of mandamus is awarded after the issuing of an alternative mandamus the person required to pay the same may be punished for a contempt of the court awarding them, or of which the judge awarding them is a member, as if the final order was a final judgment of the court.”

168. Removal of excise commissioners.— Where two members of a board of excise were elected as no license commissioners, and refused to grant a license, proceedings were commenced to remove them. A special meeting was called and an attorney was employed, who successfully defended the board. His services were held to be a proper town charge, and a mandamus

¹³⁸*Olcott v. Maclean*, 11 Hun, 394.

would issue where the board refused to audit it on the ground that it was not a town charge.¹³⁹

169. Proceedings to mortgage trust property.— A proceeding for leave to mortgage trust property, which is opposed and sent to a referee, is a special proceeding, and costs must be allowed accordingly. A trial fee is proper where it is sent to a referee, and upon an appeal from the order made therein costs must be the same as upon appeal from a judgment. But where no case is made, no charge for making and serving a case can be allowed.¹⁴⁰

170. Special proceedings before an officer.— Where a proceeding is instituted before an officer (judge at chambers), and not before a court, costs cannot be allowed for proceedings before the judge, but costs can be awarded upon appeal.¹⁴¹

171. Proceedings to discharge from imprisonment on execution.— Upon such proceedings only costs after notice (\$15) and trial fee (\$30), are allowable. The notice of the application is the only notice of trial, and is the institution of the proceeding.¹⁴² The same costs are taxable upon a proceeding to discharge an insolvent from his debts.¹⁴³

171a. Proceedings to discover the death of a tenant for life.— The costs of this proceeding are regulated by §§ 2309, 2311, and 2316 of the Code of Civil Procedure. They are fixed by the court at a gross sum not exceeding \$50, in addition to disbursements.

¹³⁹*Re Ryan*, 6 Misc. 478, 56 N. Y. S. R. 794, 27 N. Y. Supp. 169. another point in 134 N. Y. 333, 19 L. R. A. 138, 48 N. Y. S. R. 279, 32

¹⁴⁰*Re Clarke*, 27 Abb. N. C. 144, 15 N. E. 23.

N. Y. Supp. 867.

¹⁴²*Re David*, 2 Month. L. Bull. 96;

¹⁴¹*Clarke v. Sheldon*, 32 N. Y. S. R. Code Civ. Proc. § 2167.

36, 10 N. Y. Supp. 36, Reversed on ¹⁴³Code Civ. Proc. § 2193.

CHAPTER XVII.

ACTIONS BY OR AGAINST A PERSON IN A REPRESENTATIVE CAPACITY.

172. Costs in actions by or against a receiver.
- a.* In general.
 - b.* When the costs and expenses of an unsuccessful action are allowed to a receiver.
 - c.* Additional allowance.
 - d.* When the costs are ordered paid out of the fund.
 - e.* When the costs are ordered paid by the receiver personally.
 - f.* How it is determined whether the receiver shall pay costs personally, or in his representative capacity.
 - g.* How the payment of costs awarded against a receiver in his representative capacity is enforced.
173. Costs in actions by or against a trustee.
- a.* In general.
 - b.* Allowances to trustee for attorney's services in litigation.
 - c.* Allowances upon an accounting.
 - (1) To whom.
 - (2) By whom paid.
174. Costs in actions by or against executors.
- a.* In general.
 - b.* What is mismanagement.
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 - d.* When costs are allowed against an executor in his representative capacity.
 - e.* Costs upon disputed claims.
 - f.* Costs in equity actions against executors.
 - g.* Actions brought against the testator, and continued against the executor.
 - h.* What costs and disbursements are allowed against an executor.
 - i.* How and when a claim must be presented to an executor.
 - j.* To whom the claim must be presented.
 - k.* Effect of advertising for claims.
 - l.* When a claim is reasonably resisted.
 - m.* Effect of reduction of amount of claim on the question of unreasonable resistance to the claim.
 - n.* Refusal to refer.
 - o.* Unreasonably resisted.

- p.* Failure to file consent that the claim may be heard on judicial settlement.
- q.* Costs upon a statutory reference.
- r.* Costs upon a statutory reference, where the plaintiff recovers less than \$50.
- s.* Costs upon appeals.

172. Costs in actions by or against a receiver. *a. In general.*—

Costs against a receiver are exclusively chargeable upon the fund in his hands, unless the court directs them to be paid personally, for mismanagement or bad faith in the prosecution or defense of the action.¹

b. When the costs and expenses of an unsuccessful action are allowed to a receiver.—A receiver in supplementary proceedings, who has acted in good faith in bringing an action and prosecuting an appeal from an adverse decision in the trial court, may, upon his accounting, be allowed the costs and expenses of the prosecution.² The fact that the receiver appeals from the special to the appellate division from the judgment, although evidence of perseverance is no evidence of mismanagement or bad faith.³

The court upon an accounting has power to provide for the payment of the fees of the referee who took the testimony and examined the receiver's account.⁴ A receiver, like all other trustees, cannot be allowed for his own legal services rendered to himself or to his cotrustee. It was held under the common law that the receiver who was an attorney was entitled to retain the sums taxed in the fee bills. Under that practice the amounts taxed in the fee bills belonged to the attorney. Under our present practice, costs belong to the client.⁵

¹ Code Civ. Proc. § 3246.

⁴ *Re Merry*, 11 App. Div. 597, 42

N. Y. Supp. 617.

N. Y. Supp. 617.

³ *Re Merry*, 11 App. Div. 597, 42

⁵ *Re Bank of Niagara*, 6 Paige, 213.

N. Y. Supp. 617; Devendorf v. Dickinson, 21 How. Pr. 275.

c. Additional allowance.—A receiver cannot be granted an additional allowance in excess of the statutory limit of \$2,000.⁶

d. When the costs are ordered paid out of the fund.—Costs awarded against a receiver are usually ordered paid out of the fund in behalf of which they were incurred.⁷ A receiver in supplementary proceedings of an annuitant, who is made a party to an action brought by the annuitant to have his annuity declared a charge upon real estate, is not entitled to have his costs out of the fund, but must recover them from the annuitant.⁸

A receiver who is appointed after the entry of judgment cannot be made to pay out of the funds in his hands the costs awarded in that judgment against the person whose estate he is administering, because the receiver was not a party to the record.⁹ A receiver is an officer of the court, and, as such, is under the control of the court. It is the existence of this relation that gives the court power to order the receiver to pay costs. Where he is appointed by some other authority than that of the state courts,—as under the national banking act,—the court has no power to direct him to pay costs.¹⁰

e. When the costs are ordered paid by the receiver personally.—A receiver who brings an action without the leave of the court, and is defeated, is liable personally for costs;¹¹ or, where he obtains an *ex parte* order changing an order already made, in an action to which he is not a party.¹²

The want of funds by a receiver in supplementary proceedings to pay costs of an action brought by him to set aside a deed given by the judgment creditor has been held to be conclusive evidence

⁶*Hynes v. McDermott*, 14 Daly, 104, 3 N. Y. S. R. 582.

⁸*Arthur v. Dalton*, 14 App. Div. 108, 43 N. Y. Supp. 583.

⁷*Locke v. Corcoran*, 42 Hun, 484, 6 N. Y. S. R. 55, 25 N. Y. Week. Dig. 237.

⁹*Ocean Nat. Bank v. Carll*, 7 Hun, 237.

¹⁰*People v. John D. Locke Co.* 12 N. Y. Civ. Proc. Rep. 31; *Columbia*

¹¹*Ocean Nat. Bank v. Carll*, 7 Hun, 237.

Ins. Co. v. Stevens, 37 N. Y. 537, 4 Abb. Pr. N. S. 122, 35 How. Pr. 101; *Shields v. Sullivan*, 3 Dem. 296, 16 Abb. N. C. 194.

¹²*Smith v. Woodruff*, 6 Abb. Pr. 65; *Phelps v. Cole*, 3 N. Y. Code Rep. 157.

¹³*Re Castle*, 2 N. Y. S. R. 363.

of bad faith, sufficient to charge him personally with costs.¹³ It is not bad faith to prosecute a suit against the only responsible debtor, when the receiver has not funds to pay the costs, if he believes, and has good reason to believe, that he is justly entitled to recover.¹⁴ But the bringing by a receiver of an action to recover what has already been paid is such mismanagement or bad faith as will charge him personally with costs.¹⁵ A receiver is justified in defending a suit, when he does so in good faith and upon reasonable grounds. In the event of his failure to establish his defense, he will not be charged personally with costs.¹⁶ But where a receiver in supplementary proceedings thrusts himself into an action that would not be a bar to any action that he might bring, after the person under whom he claims has sworn that the claim did not belong to him, the receiver is properly charged personally with costs of his unsuccessful contention, when he has no funds in his hands to pay costs.¹⁷ A receiver should not be made to pay costs, where he holds a certificate which he cannot adjudge to be void, and places no hindrance in the way of the plaintiff, who brings an action to have it so adjudged.¹⁸ He is chargeable personally with costs where he interposes an answer which he does not try to substantiate; but then only with the extra costs that he has caused to be incurred, not the cost of the entire action.¹⁹ A receiver will not be charged personally with costs where he prosecutes an action in good faith, but which for good reasons, he does not try.²⁰

¹³*Cummings v. Egerton*, 9 Bosw. 684.

¹⁴*Cunningham v. McGregor*, 5 Duer, 648, 12 How. Pr. 305.

¹⁵*Kimberly v. Goodrich*, 22 How. Pr. 424.

¹⁶*People v. Globe Mut. L. Ins. Co.* 65 How. Pr. 239, 11 Abb. N. C. 145.

¹⁷*Bourdon v. Martin*, 74 Hun, 246, 56 N. Y. S. R. 314, 26 N. Y. Supp. 378. Affirmed in 142 N. Y. 669, 37 N. E. 571.

¹⁸*Bank of Indianapolis v. Middletown Nat. Bank*, 1 N. Y. S. R. 772.

¹⁹*First Nat. Bank v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117; *Bank of Plattsburgh v. Platt*, 1 Paige, 464; *Park v. Peck*, 1 Paige, 477.

²⁰*St. John v. Denison*, 9 How. Pr. 343; *Purdy v. Purdy*, 5 Cow. 14; *Reeder v. Seely*, 4 Cow. 548; *Phoenix v. Hill*, 3 Johns. 249.

The court has power to allow a receiver to discontinue an action brought by him, without imposing any costs upon him.²¹ The court will impose costs personally upon a receiver in an action to restrain him from attempting to use his office, where he obtains an order that the court has no jurisdiction to make, and his actions have been characterized by fraud and deceit.²²

f. How it is determined whether the receiver shall pay costs personally, or in his representative capacity.—When an action has been decided adversely to a receiver, he cannot be charged personally with costs without a notice to him that an application will be made to so charge him.²³ Such a motion should be made at special term, before the entry of judgment, before either the trial judge or any other judge.²⁴

If, without obtaining such an order, judgment should be entered charging the receiver personally with costs, he should move at special term to strike out that part of the judgment.²⁵

Upon a motion made by a receiver, where all the facts are before the court, the court can charge the receiver personally with costs of the motion.²⁶ If all the facts were not before the court upon the decision of the motion, a new motion would be necessary to place all the facts before the court.²⁷

g. How the payment of costs awarded against a receiver in his representative capacity is enforced.—Where a receiver continues an action that had been commenced before his appointment, and he is beaten, the successful party is entitled to have his costs paid at once, and is not compelled to wait for the administration of the funds, when he shows to the court, by affidavit, that the receiver has funds in his hands to a much larger amount than

²¹*Crosby v. Day*, 81 N. Y. 242.

²²*Robinson v. Wood*, 39 N. Y. S. R. 466, 15 N. Y. Supp. 169.

²³*First Nat. Bank v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117; *Marsh v. Hussey*, 4 Bosw. 614.

²⁴*Bourdon v. Martin*, 74 Hun. 246, 56 N. Y. S. R. 314, 26 N. Y. Supp.

378, Affirmed without opinion in 142 N. Y. 669, 37 N. E. 571, 60 N. Y. S. R. 870.

²⁵*First Nat. Bank v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117.

²⁶*Re Castle*, 2 N. Y. S. R. 363.

²⁷*Re Castle*, 2 N. Y. S. R. 363.

the costs awarded against him.²⁸ Upon such motion the court will not determine that the receiver has paid his attorney too much; that question will be decided upon the accounting.²⁹ A motion will lie to set aside an execution issued against a receiver personally upon a judgment for costs entered against him, when the court had not ordered the costs to be paid by the receiver personally, for mismanagement or bad faith.³⁰

173. Costs in actions by or against a trustee. a. In general.—A trustee will be charged personally with the costs of an appeal which is taken to relieve himself of costs awarded against him personally in the trial court.³¹ A trustee who continues to act after the expiration of his trust may be charged personally with costs.³² But he will not be charged with costs in trying to uphold his trust.³³

It is not sufficient, to charge a trustee personally with costs in an action brought by the plaintiff, as such, and where a referee so found, that he dropped the designation "as trustee" from the title of his report.³⁴ If a judgment for costs is entered against the plaintiff personally, and execution is issued thereon, the court on motion will correct the judgment and set aside the execution, and it may allow the defendant to make a motion to charge the plaintiff personally with costs.³⁵ A trustee who brings an action and allows his complaint to be dismissed, with costs, is not liable for costs personally until after an application is made to the court for such an order, and the court finds him guilty of mismanagement or bad faith, and grants the required order.³⁶ A motion to modify the judgment so that the trustee

²⁸*Columbia Ins. Co. v. Sterens*, 37 N. Y. 536, 35 How. Pr. 101, 4 Abb. Pr. N. S. 122.

²⁹*Devendorf v. Dickinson*, 21 How. Pr. 275.

³⁰*Marsh v. Hussey*, 4 Bosw. 614.

³¹*Pittman v. Johnson*, 35 Hun, 38, 15 Abb. N. C. 472.

³²*American L. Ins. Co. v. Van Epps*, 14 Abb. Pr. N. S. 253. Reversed on other grounds in 56 N. Y. 601.

³³*O'Brien v. Garniss*, 25 Hun, 446, 13 N. Y. Week. Dig. 422.

³⁴*Alger v. Conger*, 17 Hun, 45, 8 N. Y. Week. Dig. 181.

³⁵*Alger v. Conger*, 17 Hun, 45, 8 N. Y. Week. Dig. 181.

³⁶*Stocum v. Barry*, 38 N. Y. 46, 4 Abb. Pr. N. S. 399.

is chargeable with costs personally is not proper. The motion should be to charge the trustee personally.³⁷ Where a complaint is dismissed in the court of appeals, with costs in all the courts, the special term cannot award costs against the plaintiff personally, because that would be changing the decision of the court of appeals. If the defendant thinks that the court of appeals intended that the costs should be paid by the plaintiff personally, he should move to have the remittitur amended in that respect.³⁸ The successor of a trustee who has been ordered to pay costs personally cannot be made liable therefor personally.³⁹ Where a trustee purchases a farm to protect the estate, holding a portion of the farm personally and a portion as trustee, and brings an action for instructions, and is directed to sell the farm and deduct the expenses of the action from the proceeds of the sale, he must deduct the costs from the gross amount of the sale, and not from the share going to the estate.⁴⁰ In an action against a trustee, in which the plaintiff won, and a reference was ordered to ascertain whether the defendant should be charged personally with costs, the defendant has no right to pay his counsel with money adjudged to belong to the plaintiff.⁴¹ A trustee will be required to pay costs, where he refuses to turn over the property so held by him, until after an accounting in court, when he had no right to impose such a condition.⁴² In an action to compel a former trustee to turn over the trust fund to the substituted trustee, only taxable costs can be allowed against the former trustee. The court in that action cannot make an allowance to the attorney for the substituted trustee for services rendered to the latter, payable out of the fund. Such an allowance must be obtained in a proceeding directly instituted for that purpose.⁴³

³⁷*Butler v. Boston & A. R. Co.* 24 Hun, 99, 10 N. Y. Week. Dig. 11.

³⁸*Gomez v. Gomez*, 49 N. Y. S. R. 646, 20 N. Y. Supp. 901.

³⁹*Hughes v. Cuming*, 63 App. Div. 363, 71 N. Y. Supp. 599.

⁴⁰*Farrington v. Farmers' Loan & T. Co.* 50 N. Y. S. R. 264, 21 N. Y. Supp. 194.

⁴¹*American Life Ins. & T. Co. v. Van Eps*, 56 N. Y. 601.

⁴²*Walton v. Collins*, 38 App. Div. 439, 57 N. Y. Supp. 244.

⁴³*McKee v. Weedon*, 1 App. Div. 583, 73 N. Y. S. R. 188, 37 N. Y. Supp. 465.

A trustee who has been uniformly beaten in similar actions is properly charged personally with the costs of an appeal to the court of appeals.⁴⁴

A trustee cannot defeat the plaintiff's right to costs by doing, after the commencement of the action, the very thing to compel which the action was brought.⁴⁵ Where a trustee refuses to adjust accounts, and compels the opposite party to bring an action to settle them, the trustee is properly chargeable with the costs of the action.⁴⁶

b. Allowances to trustee for attorney's services in litigation.—A trustee or a receiver who has incurred expense in litigations brought to protect the trust fund is entitled to be reimbursed for his expenses,⁴⁷ but he should show in detail the nature of the services.⁴⁸ Where a trustee employs an attorney to foreclose several mortgages, and the attorney receives only taxable costs, either from the purchasers or the estate, the trustee cannot be compelled to return to the estate any amounts that the attorney has paid him out of his costs.⁴⁹

c. Allowances upon an accounting. (1) *To whom.*—No allowance for counsel fees can be made upon an accounting, except to the trustee.⁵⁰

A trustee who does not keep accurate books of accounts is not entitled to costs in an action brought to compel him to account.⁵¹ A trustee who has his accounts surcharged to the extent of \$1,000 should not be allowed costs.⁵²

No allowance upon an accounting will be made to a trustee who resigns for his own benefit,—*e. g.*, on account of ill health.⁵³

⁴⁴*Smith v. Central Trust Co.* 154 N. Y. 333, 48 N. E. 553.

⁴⁵*Wilcox v. Quimby*, 47 N. Y. S. R. 423, 20 N. Y. Supp. 5.

⁴⁶*Blumenthal v. Einstein*, 81 Hun. 415, 63 N. Y. S. R. 264, 30 N. Y. Supp. 1126. Affirmed on this opinion in 146 N. Y. 399, 42 N. E. 542.

⁴⁷*Woodruff v. New York, L. E. & W. R. Co.* 129 N. Y. 27, 29 N. E. 251, 41 N. Y. S. R. 193.

⁴⁸*Re New York Mut. Ins. Co.* 17 App. Div. 633, 45 N. Y. Supp. 263.

⁴⁹*Clute v. Gould*, 28 Hun. 348.

⁵⁰*Savage v. Sherman*, 87 N. Y. 277.

⁵¹*White v. Rankin*, 18 App. Div. 293, 46 N. Y. Supp. 228.

⁵²*Gomez v. Gomez*, 33 App. Div. 379, 54 N. Y. Supp. 237.

⁵³*Re Allen*, 29 Hun. 7.

(2) *By whom paid.*—The allowances to the trustee are usually allowed out of the entire estate, but where an action is brought to compel a trustee to account, by only one of the persons beneficially interested in the estate, the expense of the accounting should be borne by the share of the plaintiff.⁵⁴

174. Costs in actions by or against executors. *a. In general.*—The provisions of §§ 1835 and 1836 of the Code of Civil Procedure apply only to actions arising out of the claims of creditors, and matters which constituted a charge against the estate at the time of the death of the deceased. They have no reference to a claim brought into being by the personal act of the representative, or a claim or demand arising solely out of matters independent of the estate of the deceased. In the latter case costs are governed by the provisions of § 3246 of the Code of Civil Procedure.⁵⁵ An executor who is a defendant is not entitled to costs because they are denied to the plaintiff, where the plaintiff recovers judgment, and, if the action had been against the executor personally, the plaintiff would have been entitled to costs as a matter of right, but costs are denied him on account of the provisions of § 1835 or § 1836 of the Code of Civil Procedure.⁵⁶ An executor is liable personally for all legal services rendered him in the administration of his trust. In a proper case he will be allowed for such disbursements upon the final accounting. A suit to recover for such service must be brought against him personally, and if judgment is rendered against him therefor, costs will be taxed against him personally, as in any other action.⁵⁷ An executor who is also a trustee, and is directed by the will to do certain things, must be sued in his representative capacity on a contract thus made. The provisions of the

⁵⁴*Gomez v. Gomez*, 33 App. Div. 379, 54 N. Y. Supp. 237.

⁵⁶*Hopkins v. Lott*, 111 N. Y. 577, 19 N. E. 273.

⁵⁵*Dunn v. Arkenburgh*, 48 App. Div. 518, 62 N. Y. Supp. 861.

⁵⁷*Smith v. Patten*, 9 Abb. Pr. N. S. 205. (See note.)

Code of Civil Procedure as to costs in actions against the executors have no application to such a case.⁵⁸

He must bring all suits in tort or on contract in his representative capacity, where the cause of action arose in the lifetime of the testator. In these cases, if he is unsuccessful he will not be compelled to pay costs, unless he is guilty of mismanagement or bad faith.⁵⁹ But if the cause of action arose after the death of his testator, he may bring the action personally, and, if unsuccessful, will be compelled to pay costs. Though he may bring such an action in his representative capacity, he is not compelled to do so, and he will be liable for costs whether he brings the action personally or in his representative capacity.⁶⁰ Under the Revised Statutes and under the Code of Procedure the exemption from costs applied only to actions brought against an executor or administrator, and not to actions brought by him.⁶¹ This distinction does not exist under the present Code. In an action for conversion or injury to property, which happens after the death of the testator, although before letters are issued, the executor is liable for costs in case of his defeat.⁶² An executor is personally liable for costs in an action founded upon a contract made after the death of his testator.⁶³ Upon his accounting he should be allowed the costs of an action brought

⁵⁸*O'Brien v. Jackson*, 42 App. Div. 625; *Ackley v. Ackley*, 50 N. Y. S. R. 171. 58 N. Y. Supp. 1044. 554, 21 N. Y. Supp. 877; *Lyon v.*

⁵⁹*Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; *Burhans v. Blanchard*, 1 Denio. 626. *Marshall*, 11 Barb. 248; *Ketchum v. Ketchum*, 4 Cow. 87; *Pecple ex rel. Bailey v. Albany Mayor's Court*

⁶⁰*Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; *Burhans v. Blanchard*, 1 Denio. 626; *Valentine v. Jackson*, 9 Wend. 302; *Merritt v. Scamman*, 6 N. Y. 168; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Lyon v. Marshall*, 11 Barb. 241. *Judges*, 9 Wend. 486; *Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; *Fox v. Fox*, 5 Hun. 53; *Holdridge v. Scott*, 1 Lans. 303; *Feig v. Wray*, 64 How. Pr. 391, 2 N. Y. Civ. Proc. Rep. (McCarty) 386. 3 N. Y. Civ. Proc. Rep. 159.

⁶¹*Fox v. Fox*, 22 How. Pr. 453. ⁶²*Bostwick v. Brown*, 15 Hun. 308; *Burhans v. Blanchard*, 1 Denio, 626; *Mullen v. Guinn*, 88 Hun. 128, 68 N. Y. S. R. 680, 34 N. Y. Supp. Hun, 361. *Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; *Grout v. Carver*, 15

against him personally, upon a contract made by him as executor, that he paid, and a reasonable compensation to his attorney, if he defended the action in good faith.⁶⁴ When an executor recovers costs, he must charge himself with receiving that much money, and may credit himself with what his attorney's services are worth.⁶⁵

In all cases where the executor may bring the action in his personal capacity the opposing party, if successful, is entitled to costs against the executor personally, as a matter of right, and he may tax them without making an application to the court.⁶⁶

An executor will not be charged with costs on the ground that the action is personal, when he was compelled to bring it in his representative capacity. In such a case, if his action is groundless, he may be compelled to pay costs for mismanagement or bad faith.⁶⁷

b. What is mismanagement.—The executors will be compelled to pay costs in an action brought to compel them to make good the loss occasioned to the estate on account of their unauthorized investments,⁶⁸ or any other misappropriation.⁶⁹ Where a judgment with costs is not obtained against an executor for such misappropriation until after his death, the plaintiff must share with the other creditors upon the distribution of the proceeds of the sale of the deceased executor's real estate as to the amount of the recovery, but he cannot have the costs of the action paid *pro rata* out of the proceeds.⁷⁰ Where a complaint is dismissed with costs, and an extra allowance granted to the

⁶⁴*Grout v. Carrer*, 15 Hun. 361.

Smith v. Patten, 9 Abb. Pr. N. S.

⁶⁵*Bradley's Estate*, 17 N. Y. S. R. 836, 1 Connolly, 106, 2 N. Y. Supp. 751.

205 (see note); *Mullen v. Guinn*, 88 Hun. 128, 68 N. Y. S. R. 680, 34 N. Y. Supp. 625.

⁶⁶*Feig v. Wray*, 64 How. Pr. 391, 2 N. Y. Civ. Proc. Rep. (McCarty)

⁶⁷*Spencer v. Strait*, 40 Hun, 463, 23 N. Y. Week. Dig. 458.

386, 3 N. Y. Civ. Proc. Rep. 159;

⁶⁸*Ackerman v. Emott*, 4 Barb. 626.

Bostwick v. Brown, 15 Hun. 308;

⁶⁹*Re Fox*, 92 N. Y. 93; *Ray v. Van*

Holdridge v. Scott, 1 Lans. 303;

Hook, 9 How. Pr. 427.

Lyon v. Marshall, 11 Barb. 241;

⁷⁰*Re Fox*, 92 N. Y. 93.

defendant, and the plaintiff dies before the entry of judgment, the plaintiff's executor has a right to be substituted in the action, if for no other reason than that he may have a right to review by an appeal the extra allowance.⁷¹

Costs are properly chargeable against the executors in an action to compel them to account, or where they seek to retain the trust property as their own.⁷²

An executor will be charged with mismanagement, where he conducts an action in his representative capacity, to obtain a personal benefit, and is defeated in the action.⁷³

It is not mismanagement or bad faith to seek to recover property from the defendant, which he claims he received from the testator as a gift, shortly before his death.⁷⁵

c. Procedure to charge executor personally with costs.—To charge an executor personally with costs, application should be made to the court upon notice of motion.⁷⁶ Where such a motion is made at a term of the court not held by the same judge before whom the action was tried, the certificate of the trial judge must be presented, showing the facts bearing on the question of costs.⁷⁷ The appellate court has no power to pass upon that question, when it was not raised below.⁷⁸ Where the special term refuses to charge an executor personally with costs, and such order is affirmed by the general term, the opposing party has no power to enter judgment charging the costs against the executor personally. If the special term acted upon an imper-

⁷¹*Armstrong v. Union College*, 55 App. Div. 302, 8 N. Y. Anno. Cas. 332, 66 N. Y. Supp. 942. *ing Co.* 18 Misc. 434, 41 N. Y. Supp. 788; *Woodruff v. Cook*, 14 How. Pr. 481.

⁷²*Peltz v. Schultes*, 48 N. Y. S. R. 2, 20 N. Y. Supp. 336. ⁷³*Parkhill v. Hillman*, 12 How. Pr. 353.

⁷⁴*Gross v. Moore*, 14 App. Div. 353, 43 N. Y. Supp. 945. ⁷⁵*Smith v. A. D. Farmer Type Founding Co.* 18 Misc. 434, 41 N. Y. Supp. 788; *Jack v. Robie*, 48 Hun, 181-185.

⁷⁶*McGovern v. McGovern*, 18 Jones & S. 390. ⁷⁷*Slocum v. Barry*, 38 N. Y. 46; *Smith v. A. D. Farmer Type Found-*

fect state of facts, the remedy would be to ask it to grant, in its discretion, a reargument upon the facts stated fully.⁷⁹ The question whether an executor is chargeable personally with costs cannot be attacked collaterally. Where the appellate court has directed judgment, with costs, against the executor in his representative capacity, that impliedly determines that he is not liable personally. After such determination the court at special term has no power to again consider the question of charging him personally.⁸⁰ But the question whether he should be charged personally with costs of an unsuccessful appeal should be decided at special term in the court of original jurisdiction.⁸¹ The fact that the executor would be beneficially benefited by a recovery is no reason for charging him with costs. This can only be done by charging him with mismanagement or bad faith, as provided by statute.⁸²

d. When costs are allowed against an executor in his representative capacity.—An executor who brings an unsuccessful action must pay costs the same as if he had brought the action in his own right.⁸³ In such a case the judgment should be entered against the plaintiff “as executor, etc.” The judgment should not add the words “exclusively chargeable and collectiable from the estate or funds of said deceased,” as the words import that the court has passed upon the question as to the personal liability of the plaintiff. The addition of these words add nothing to the legal consequences of the award, and are therefore unnecessary.⁸⁴ Sections 1835 and 1836 of the Code of Civil

⁷⁹*Place v. Hayward*, 19 Jones & S. 509, Affirmed in 100 N. Y. 626, 3 N. E. 199.

⁸⁰*Hone v. De Peyster*, 106 N. Y. 645, 13 N. E. 778.

⁸¹*Harrington v. Strong*, 49 App. Div. 39, 63 N. Y. Supp. 257.

⁸²*Hone v. De Peyster*, 106 N. Y. 645, 13 N. E. 778; *Finley v. Jones*, 6 Barb. 229.

⁸³*Cohu v. Husson*, 24 Jones & S. 489, 5 N. Y. Supp. 7; *Lindsay v. Deafendorf*, 43 How. Pr. 90; *Re Darling*, 39 N. Y. S. R. 43, 14 N. Y. Supp. 445.

⁸⁴*Weeks v. Garvey*, 24 Jones & S. 562, 4 N. Y. Supp. 891

Procedure refer only to actions brought against the executor, and exempt him under certain circumstances, from costs up to the judgment, but have no reference to costs upon appeal. If an executor appeals from a judgment taken against him, and appeals in vain, costs of such appeal may be awarded against him, notwithstanding the exemption accorded him in the first instance.⁸⁵ But the executor is entitled to one lawful trial without being subjected to costs. This means the last trial. Up to the final judgment, no costs can be allowed, either for trials or successful appeals taken by him. But he is liable for unsuccessful appeals from a judgment against him.⁸⁶ Costs may be taxed in such cases against the executor in his representative capacity, by the clerk, and no application to the court is necessary.⁸⁷ In the absence of a special order charging him with mismanagement or bad faith, the costs are collectable from the estate.⁸⁸ An executor will be presumed to have the funds of the estate in his hands until he has made an accounting. The fact that he alleges that he has no money in his hands with which to obey an order requiring him to pay costs is not an answer to a motion to punish him for contempt.⁸⁹ He will not be charged personally with costs, where he is defeated by the acts of the defendant subsequent to the commencement of the action. A plaintiff was not charged with costs where both himself and defendant were named as executors, and the defendant refused to qualify as such executor, but, after the commencement of the action, did qualify, and thus defeated the action.⁹⁰

⁸⁵*Benjamin v. Ver Nooy*, 36 App. Div. 581. 29 N. Y. Civ. Proc. Rep. 120, 55 N. Y. Supp. 796; *Hunt v. Connor*, 14 Abb. Pr. 466; *Judah v. Stagg*, 22 Wend. 641.

⁸⁶*Benjamin v. Ver Nooy*, 168 N. Y. 578, 61 N. E. 971.

⁸⁷*Cohn v. Husson*, 24 Jones & S. 489, 5 N. Y. Supp. 7; *Lindsay v. Deafendorf*, 43 How. Pr. 90; *Wood-*

ruff v. Cook, 14 How. Pr. 481; *Curtis v. Dutton*, 4 Sandf. 719.

⁸⁸*Lindsay v. Deafendorf*, 43 How. Pr. 90; *Dodge v. Crandall*, 30 N. Y. 294; *Slocum v. Barry*, 38 N. Y. 46; *Fish v. Crane*, 9 Abb. Pr. N. S. 252; *Howe v. Lloyd*, 9 Abb. Pr. N. S. 257. 2 Lans. 335.

⁸⁹*Gillies v. Kreuder*, 1 Dem. 349.

⁹⁰*Dean v. Roseboom*, 37 Hun, 310.

Where an administrator brings an action for damages for the killing of his intestate, and he is defeated, with costs, the surrogate will not grant permission to the defendant to issue an execution for the collection of such costs.⁹¹

e. Costs upon disputed claims.—Previous to the amendment of 1893 of § 2718 of the Code of Civil Procedure, the referee upon a disputed claim had no power over the question of costs, because this was a special proceeding, and not an action, and the report of the referee had to be confirmed before entering judgment thereon.⁹² By that amendment the referee was given power to award costs, subject to §§ 1835 and 1836 of the Code of Civil Procedure.⁹³

The facts upon which costs are granted or refused depend upon circumstances outside of the litigation, and not within its issues. The certificate of the judge or referee is a necessary basis of the award, and without it the facts cannot wholly appear. The evidence on the trial, and its results, may be taken into account, but cannot serve without the prescribed certificate.⁹⁴ The judge or referee must certify that the creditor presented his claim to the executors within the time required by law, and that the claim was unreasonably resisted or neglected, or that the executor did not file the consent required by § 1822 of the Code of Civil Procedure.⁹⁵

A report that states that the plaintiff is entitled to judgment “with the usual costs and disbursements” is not such a certifi-

⁹¹*Re McCullough*, 18 Misc. 721, 43 83 Hun, 403, 64 N. Y. S. R. 667, 31 N. Y. Supp. 968.

⁹²*McBride v. Chamberlain*, 56 N. Y. S. R. 431, 26 N. Y. Supp. 91; *Roe v. Boyle*, 81 N. Y. 305; *Eldred v. Eames*, 115 N. Y. 403, 22 N. E. 216, 26 N. Y. S. R. 277; *Mersereau v. Ryerss*, 12 How. Pr. 300; *Smith v. Randall*, 67 Barb. 377; *Ely v. Taylor*, 42 Hun, 205.

⁹⁴*Matson v. Abbey*, 141 N. Y. 179, 56 N. Y. S. R. 690, 36 N. E. 11; *Wray v. Halliday*, 3 Month. L. Bull. 98.

⁹⁵Code Civ. Proc. § 1836; *King v. Todd*, 27 Abb. N. C. 149, 21 N. Y. Civ. Proc. Rep. 114, 15 N. Y. Supp. 156.

⁹³*Niles v. Crocker*, 88 Hun, 313, 34 N. Y. Supp. 761; *Henning v. Miller*.

cate as the law requires, and the plaintiff is not entitled to costs.⁹⁶ But he is entitled to his disbursements.⁹⁷

Where a party thinks that he is entitled to costs against executors, he must make his application therefor,⁹⁸ setting up the facts not embraced within the issue, upon which, together with evidence upon the trial and result of the trial, the question of costs depends. The defendant must be heard upon the application whenever it is made.⁹⁹ It is an irregularity to enter costs without the certificate required by law.¹⁰⁰ If the question again comes before the special term upon a motion to strike out the costs thus improperly taxed, the court can then grant the certificate and allow the costs to be taxed.¹⁰¹ The irregularity will be deemed waived, if notice of taxation of costs is served and the defendant does not appear.¹⁰² When costs are taxed without an application therefor, and the defendant moves to strike out the costs thus irregularly taxed, he should show that the plaintiff is not entitled to costs. If the special term refuses to strike out such costs, and the defendant appeals from the judgment and order refusing to strike out the costs, he will be charged personally with the costs of the appeal, where the judgment and order are affirmed.¹⁰³ But where an appeal is taken from the judgment as entered, and the special term has not had the matter

⁹⁶*Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676.

⁹⁷*Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676; *Niles v. Crocker*, 88 Hun. 312, 34 N. Y. Supp. 761; *Halloek v. Bacon*, 64 Hun. 90, 19 N. Y. Supp. 91.

⁹⁸*Morgan v. Skidmore*, 3 Abb. N. C. 92, Affirmed in effect in 55 Barb. 263; *Hall v. Brennan*, 64 Hun. 394, 46 N. Y. S. R. 777, 19 N. Y. Supp. 623; 3 Wait, Pr. 535; *Bailey*, Trial Practice, 384, 385.

⁹⁹*Burrows v. Butler*, 22 N. Y. Week. Dig. 489.

¹⁰⁰*Darde v. Conklin*, 73 App. Div. 590, 77 N. Y. Supp. 39.

¹⁰¹*Hees v. Nellis*, 65 Barb. 440, 1 Thomp. & C. 118; *Howe v. Lloyd*, 2

Lans. 335, 9 Abb. Pr. N. S. 257; *Cotes v. Smith*, 29 How. Pr. 331; *New York v. Lyons*, 1 Daly. 300; *Clumpha v. Whiting*, 10 Abb. Pr. 448; *Kellogg v. Baker*, 15 Abb. Pr.

288; *D'Ivernois v. Leavitt*, 8 Abb. Pr. 60; *Vail v. Remsen*, 7 Paige. 206; *Brady v. Donnelly*, 1 N. Y. 126; *Effray v. Mason*, 22 N. Y. Civ. Proc. Rep. 59, 42 N. Y. S. R. 657, 18 N. Y. Supp. 350.

¹⁰²*Snyder v. Young*, 4 How. Pr. 217.

¹⁰³*Hees v. Nellis*, 65 Barb. 440, 1 Thomp. & C. 118.

before it again, the appellate court will strike out the costs thus improperly entered.¹⁰⁴

The discretion of the trial judge in awarding costs will not be disturbed upon appeal, unless it is quite clear that it was erroneously exercised.¹⁰⁵

f. Costs in equity actions against executors.—In an action in equity against an executor which is tried before a referee, costs are in the discretion of the referee, and, if allowed at all, he must allow them.¹⁰⁶ After such allowance the party feeling aggrieved thereby should except to the findings of the referee, and appeal from the judgment entered thereon.¹⁰⁷ The court at special term has no power to review such discretion when the matter is presented to it upon motion.¹⁰⁸

g. Actions brought against the testator, and continued against the executor.—Sections 1835 and 1836 of the Code of Civil Procedure do not apply to actions at law commenced against the intestate in his lifetime, and which, after his death, are continued by order against his executor. If the plaintiff recovers, he is entitled to costs as a matter of right.¹⁰⁹ One case that held otherwise was expressly overruled.¹¹⁰

h. What costs and disbursements are allowed against an executor.—In an action against an executor, where the plaintiff is allowed costs, this, of course, includes all necessary disburse-

¹⁰⁴*Matson v. Abbey*, 141 N. Y. 179. Y. S. R. 431. 26 N. Y. Supp. 91: 56 N. Y. S. R. 690, 36 N. E. 11. *Woodford v. Bucklin*, 14 Hun, 444;

¹⁰⁵*Mercantile Safe Deposit Co. v. Dimon*, 55 App. Div. 538, 67 N. Y. Supp. 430. *Rosa v. Jenkins*, 31 Hun, 384. ¹⁰⁶*McBride v. Chamberlain*, 56 N. Y. S. R. 431, 26 N. Y. Supp. 91.

¹⁰⁷Code Civ. Proc. § 1022; *McBride v. Chamberlain*, 56 N. Y. S. R. 431, 26 N. Y. Supp. 91; *Barker v. White*, 3 Keyes, 617; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Herrington v. Robertson*, 71 N. Y. 280; *Mersereau v. Ryerss*, 12 How. Pr. 300; *Hinds v. Myers*, 4 How. Pr. 356. 3 N. Y. Code Rep. 48. ¹⁰⁸*Merritt v. Thompson*, 27 N. Y. 225; *McCann v. Bradley*, 15 How.

¹⁰⁹*McBride v. Chamberlain*, 56 N. Pr. 79.

ments. It was a mooted question for some time whether a plaintiff who recovered in such an action and was refused costs was entitled to his disbursements. It is now settled that in such a case the plaintiff is entitled to his disbursements; that under § 317 of the Code of Procedure, they were allowed, and this provision was not repealed by the act of 1880.¹¹¹ The cases that held the contrary have been expressly disapproved.¹¹² The plaintiff may also be allowed an additional allowance in a proper case.¹¹³

i. How and when a claim must be presented to an executor.

—A claim upon which an action at law is brought must be presented to the executor after his appointment, and must be rejected by him, to entitle the plaintiff, when successful, to recover costs.¹¹⁴ Where a claim has not been presented within the time limited by the notice to present claims, the plaintiff, in case of a successful action thereon, is not entitled to either the costs or disbursements of the action, although it is stipulated upon the reference thereon “that the costs of the reference are to be taxed as the costs of the case.” The “costs of the reference” in such a stipulation mean the ordinary expenses incident to a reference, namely, disbursements, referee’s fees, witness fees, and other

¹¹¹*Larkins v. Maxon*, 103 N. Y. 680, 9 N. E. 56, 1 Silv. Ct. App. 215, 11 N. Y. Civ. Proc. Rep. 298, 25 N. Y. Week. Dig. 39, 3 N. Y. S. R. 642; ¹¹²*Larkins v. Maxon*, 103 N. Y. 680, 9 N. E. 56, 1 Silv. Ct. App. 215, 11 N. Y. Civ. Proc. Rep. 298, 25 N. Y. Week. Dig. 39, 3 N. Y. S. R. 642, 9 N. E. 56.
Lounsbury v. Sherwood, 53 App. Div. 318, 65 N. Y. Supp. 676; *Hatch v. Stewart*, 42 Hun, 164, 25 N. Y. Week. Dig. 371, 5 N. Y. S. R. 180; *Niles v. Crocker*, 88 Hun, 312, 34 N. Y. Supp. 761; *Hallock v. Bacon*, 64 Hun, 90, 19 N. Y. Supp. 91; *Krill v. Brownell*, 40 Hun, 72; *Sutton v. Newton*, 15 Abb. N. C. 452, 2 How. Pr. N. S. 56, 7 N. Y. Civ. Proc. Rep. 333; *Hall v. Edmunds*, 67 How. Pr. 202; *Overheiser v. Morehouse*, 16 Abb. N. C. 208, 2 How. Pr. N. S. 257, 8 N. Y. Civ. Proc. Rep. 11.
Fort v. Gooding, 9 Barb. 388; *Niblo v. Binsse*, 47 Barb. 435, 32 How. Pr. 92; *Davis v. Myers*, 86 Hun, 236, 67 N. Y. S. R. 37, 33 N. Y. Supp. 352; *Johnson v. Myers*, 103 N. Y. 666, 9 N. E. 55.
¹¹⁴*Niles v. Crocker*, 88 Hun, 312, 68 N. Y. S. R. 579, 34 N. Y. Supp. 761; *Beecher v. Duel*, 14 N. Y. Week. Dig. 109; *Chesebro v. Hicks*, 66 How. Pr. 194; *Keyser v. Kelly*, 11 Jones & S. 22; *Mundorff v. Wangler*, 57 How. Pr. 372, 12 Jones & S. 495.

proper charges, and that these should be taxed as a part of the costs of the case. As the plaintiff cannot tax the costs, he cannot tax the disbursements, because the latter stand upon the same foundation as the former.^{114a} It is otherwise in an action in equity.¹¹⁵ The claim must be presented to entitle the creditor to recover costs, although the claim is against the executor as surety, and a right of action may never exist.¹¹⁶ A successful plaintiff is entitled to costs where he presents his claim, which is rejected, before the executor commences to advertise for claims,¹¹⁷ or if he presents it at any time, where the executor never advertises for claims.¹¹⁸

The executor may unduly resist a claim not properly presented, and not be liable for costs in case he is not successful.¹¹⁹ To entitle the plaintiff to costs the claim presented must be the same as the one on which the recovery is had.¹²⁰ Where a claim for services that would be outlawed was presented and rejected the plaintiff recovered in an action upon a special contract, in which the testator agreed to compensate the plaintiff by will for the very same services, the claim for which had been rejected, but the plaintiff was not allowed costs or disbursements on the ground that the recovery was upon a different demand than that which was presented to and rejected by the executor.¹²¹ Where costs are given to the plaintiff in an action against an executor, this is *res judicata* upon the question of the presentation of the plaintiff's claims to the executor within the time limited by the published notice to present claims.¹²²

^{114a}*Nichols v. Moloughney*, 85 App. Div. 1, 82 N. Y. Supp. 949.

¹¹⁵*Keyser v. Kelly*, 11 Jones & S. 22; *Yorks v. Peck*, 9 How. Pr. 201.

¹¹⁶*Supplee v. Sayre*, 51 Hun, 30, 20 N. Y. S. R. 554, 3 N. Y. Supp. 627.

¹¹⁷*Field v. Field*, 77 N. Y. 294.

¹¹⁸*Brinker v. Loomis*, 43 Hun, 247, 26 N. Y. Week. Dig. 35, 5 N. Y. S. R. 439.

¹¹⁹*Niles v. Crocker*, 88 Hun, 312, 68 N. Y. S. R. 579, 34 N. Y. Supp. 761.

¹²⁰*Wallace v. Markham*, 1 Denio, 671; *Genet v. Binsse*, 3 Daly, 239;

Carter v. Beckwith, 104 N. Y. 236, 10 N. E. 350.

¹²¹*Beecher v. Duel*, 14 N. Y. Week. Dig. 109.

¹²²*Re Gall*, 40 App. Div. 114, 29

When it is a disputed question whether the claim was duly presented and rejected, the affidavits upon this question should give specific interviews, with their dates or, where it is done by correspondence, the contents of the letters or copies of them: who made the demand, and what was said at the interviews.¹²³ The claim must be presented in writing. A verbal presentation is not enough. It need not be verified unless the executor demands it.¹²⁴ An absolute rejection, without demanding that it be verified, is sufficient. The executor cannot afterwards raise the question that the claim was not verified, as he has waived that. Presentment is not excused because the executor has knowledge of the existence of the claim.¹²⁵

j. To whom the claim must be presented.—It is sufficient if the claim is presented to one of two or more executors.¹²⁶ It is not necessary that the claim be presented to an executor or administrator substituted as a defendant in an action in the place of the decedent.¹²⁷

k. Effect of advertising for claims.—An executor is not liable for costs, where he has published the statutory notice for the presentation of claims, and the claim in suit has not been presented. It makes no difference that the creditor has no actual knowledge of the publication.¹²⁸

The mere fact that an executor did not advertise for claims will not render him liable for costs upon an unsuccessful defense. There must also be an unreasonable resistance or neglect, or a failure to file the consent required by § 1822 of the Code of Civil Procedure.¹²⁹

N. Y. Civ. Proc. Rep. 178, 57 N. Y. Supp. 835.

¹²³*Chesbro v. Hicks*, 66 How. Pr. 194.

¹²⁴*King v. Todd*, 21 N. Y. Civ. Proc. Rep. 114, 27 Abb. N. C. 149, 15 N. Y. Supp. 156.

¹²⁵*Niles v. Crocker*, 88 Hun. 312, 68 N. Y. S. R. 579, 34 N. Y. Supp. 761.

¹²⁶*Genet v. Binsse*, 3 Daly, 239.

¹²⁷*Tindall v. Jones*, 19 How. Pr. 469, 11 Abb. Pr. 258.

¹²⁸*Clarkson v. Root*, 18 Abb. N. C. 462; *Horton v. Brown*, 29 Hun. 654; *Supplee v. Sayre*, 51 Hun. 30, 29 N. Y. S. R. 554, 3 N. Y. Supp. 627.

¹²⁹*Snyder v. Young*, 4 How. Pr. 217; *Bullock v. Bogardus*, 1 Denio, 276; *Bradley v. Burwell*, 3 Denio, 261.

l. When a claim is reasonably resisted.—A claim cannot be said to be unreasonably resisted until the executors have had time to consider the matter. A plaintiff who brings an action before the expiration of that time is not entitled to costs, although he recovers a verdict.¹³⁰ It is not unreasonable to resist the payment of a claim of which the executor has no personal knowledge and which is nearly outlawed;¹³¹ nor to resist a claim that was presented to the deceased in his lifetime for a certain amount, but is presented to the executor for a much larger amount, even though the plaintiff recovers a sum larger than the original bill, but not as large as that presented to the executor.¹³² A claim is not unreasonably resisted, where the first item was \$5,000 for services to the decedent as a nurse, and an action was brought within two months after letters were issued.¹³³ Where a referee in partition died without having paid over the part of the money going to unknown heirs, and those entitled to the money commenced proceedings against his executor, it was held that the executor should not be made to pay costs, as he was guilty of no wrong.¹³⁴

An executor cannot be said to have unreasonably resisted a claim where he has won on two trials, but lost on the third, and he has found among the papers of the deceased papers and documents from which he had the right to assume that the debt was paid.¹³⁵ The mere fact that the plaintiff recovers a judgment for the amount of the claim presented is not proof that the claim was unreasonably resisted.¹³⁶ It is not unreasonable to resist liability of the testator as indorser of a note, where he died before the maturity of a note.¹³⁷

¹³⁰*Macy v. Williams*, 55 Hun, 489, 30 N. Y. S. R. 345, 8 N. Y. Supp. 658. ¹³⁵*Vaughn v. Strong*, 66 Hun, 278, 49 N. Y. S. R. 319, 21 N. Y. Supp.

¹³¹*Chesebro v. Hicks*, 66 How. Pr. 154, 194.

¹³²*Harrison v. Ayers*, 18 Hun, 336, Misc. 305, 60 N. Y. Supp. 513, Affirming 28 Misc. 789, 59 N. Y. Supp. 383. ¹³⁶*Ehrenreich v. Lichtenberg*, 29

¹³³*Buckhout v. Hunt*, 16 How. Pr. 407. ¹³⁷*Bank of Port Jefferson v. Dar-*

¹³⁴*Brown v. King*, 63 Hun, 158, 45 N. Y. S. R. 24, 17 N. Y. Supp. 678. *ling*, 91 Hun, 236, 72 N. Y. S. R. 54, 36 N. Y. Supp. 153.

In an action for damages for an eviction from land leased from the intestate, where the plaintiff recovers 6 cents damages, the claim cannot be said to have been unreasonably resisted, therefore the plaintiff is not entitled to costs.¹³⁸

Costs should not be granted where a defense was interposed in good faith, and would, doubtless, have succeeded if certain witnesses for the defense could have been procured.¹³⁹

Costs should not be allowed against an executor where the credit was originally given to a third person, but upon trial it was proved to be for the benefit of the deceased.¹⁴⁰

A claim is not unreasonably resisted where the interest on the claim has been reduced from 10 per cent to 6 per cent.¹⁴¹ Nor is a claim unreasonably resisted where, after making a payment thereon, the administrator, upon the advice of counsel that the entire claim is illegal, refuses to pay any more, and fails to sustain his defense in an action brought thereon.¹⁴²

m. Effect of reduction of amount of claim on the question of unreasonable resistance to the claim.—If the amount of recovery is materially reduced from the amount of the claim presented, this fact has been held sufficient to show that the claim was not unreasonably resisted.¹⁴³ The claim was not unreasonably resisted where it was reduced one third,¹⁴⁴ or three sevenths,¹⁴⁵ or one half.¹⁴⁶ Executors should not be held liable for costs where they reduce a claim for the board of a testator.¹⁴⁷ Where executors have reduced claims in the following amounts, it was held

¹³⁸*Hopkins v. Lott*, 111 N. Y. 577. N. Y. Civ. Proc. Rep. 11; *Healy v. Malcolm*, 75 App. Div. 422, 78 N. Y. 19 N. E. 273.

¹³⁹*Stephenson v. Clark*, 12 How. Pr. Supp. 315. 282.

¹⁴⁰*Comstock v. Olmstead*, 6 How. 216. 44 N. Y. Supp. 196.

¹⁴¹*Ryan v. McElroy*, 15 App. Div. 50. 5 N. Y. Supp. 405.

¹⁴²*Davis v. Myers*, 86 Hun. 236. 67 N. Y. S. R. 37. 33 N. Y. Supp. 352.

¹⁴³*Proude v. Whiton*, 15 How. Pr. C. 107; *Daggett v. Mead*, 11 Abb. N. C. 116. 304.

¹⁴⁴*Overheiser v. Morehouse*, 2 How. Pr. N. S. 257, 16 Abb. N. C. 208. 8 Week. Dig. 566.

¹⁴⁵*Bailey v. Schmidt*, 19 N. Y. S. R. 50. 5 N. Y. Supp. 405.

¹⁴⁶*Pinkernelli v. Bischoff*, 2 Abb. N. C. 107; *Daggett v. Mead*, 11 Abb. N. C. 116.

¹⁴⁷*Webster v. Nichols*, 21 N. Y. Week. Dig. 566.

that the claim was not unreasonably resisted, and the plaintiff was not entitled to costs: Reduced from \$3,000 to \$300 upon an unliquidated claim;¹⁴⁸ from over \$60,000 and large amount of interest, further reduced by the general term to \$10,000;¹⁴⁹ from \$1,000 to \$350;¹⁵⁰ from \$306.36 to \$93.¹⁵¹

n. Refusal to refer.—Under § 1836 of the Code of Civil Procedure, before the amendment in 1895, which provided that the plaintiff was entitled to costs where the claim was presented within the time limited by the notice to present claims, and payment thereof had been unreasonably resisted or neglected, or the defendant had refused to refer the claim, the following decisions held that the plaintiff was entitled to costs because the defendant had absolutely refused to refer. Although the claim was presented for \$2,554.25, and an action was brought for \$1,412.63, and the recovery thereon was \$573.63;¹⁵² or was reduced from \$2,551.04 to \$192.90;¹⁵³ or was reduced from \$1,510.80 to \$461.19;¹⁵⁴ or was reduced from \$3,800 to \$1,250, although the claim was presented in the name of a firm, but the recovery was had by one member thereof.¹⁵⁵

These recoveries were had in actions after an absolute refusal to refer. If these recoveries had been had upon a statutory reference, costs would undoubtedly have been denied. These cases are not now in point, as the provision that a refusal to refer when a claim was properly presented rendered the executor liable for costs if judgment went against him has been removed by the amendment of 1895.

¹⁴⁸*Ruth v. Davenport*, 22 N. Y. Civ. Proc. Rep. 121, 45 N. Y. S. R. 926, 18 N. Y. Supp. 721.

¹⁴⁹*Johnson v. Myers*, 103 N. Y. 666, 1 Silv. Ct. App. 209, 25 N. Y. Week. Dig. 75, 3 N. Y. S. R. 655, 9 N. E. 55.

¹⁵⁰*Cruikshank v. Cruikshank*, 9 How. Pr. 350.

¹⁵¹*Healy v. Murphy*, 21 N. Y. Civ. Proc. Rep. 13, 16 N. Y. Supp. 541.

¹⁵²*Carter v. Beckwith*, 104 N. Y. 236, 25 N. Y. Week. Dig. 373, 5 N. Y. S. R. 617, 10 N. E. 350.

¹⁵³*Nellis v. Duesler*, 44 N. Y. S. R. 228, 18 N. Y. Supp. 315.

¹⁵⁴*Davis v. Gallagher*, 37 App. Div. 627, 29 N. Y. Civ. Proc. Rep. 149, 55 N. Y. Supp. 1066.

¹⁵⁵*Genet v. Binsse*, 3 Daly, 239.

o. Unreasonably resisted.—The plaintiff is entitled to costs where the referee finds, as a matter of fact, that the claim was unreasonably resisted.¹⁵⁶ It will be assumed that he was of this opinion from the facts which appeared upon the trial.¹⁵⁷

Whether payment of a claim is unreasonably resisted depends very largely upon matters outside of, and not connected with, the cause of action or the merits of a claim. If an action is brought before the expiration of the year allowed to the administrators for the payment of debts or claims against the estate, the complaint must state facts showing that the payment was unreasonably resisted, and the certificate of the judge must certify facts showing the necessity and propriety of bringing the action at that time.¹⁵⁸

A claim is unreasonably resisted when the executor, by proper inquiry, could have found that the bill was proper, or the testator ordered the bill paid, by a clause in his will,¹⁵⁹ or left such a direction in his papers, and the executor does not seek the corroborative evidence necessary to justify him in paying the bill.¹⁶⁰ An executor should be required to pay costs where the testator directs that the persons taking care of him should be well rewarded, and the referee allows the claim for the full amount.¹⁶¹

A claim is unreasonably resisted when the objection is not promptly raised, and when raised is unsuccessful.¹⁶² Costs are properly allowed against an executor when he rejects no item of the account, and the amount due upon the claim depends upon the question of interest.¹⁶³ A claim is unreasonably resisted

¹⁵⁶*Ellis v. Filon*, 85 Hun. 485. 66 N. Y. S. R. 764, 33 N. Y. Supp. 138. ¹⁶⁰*Kellogg v. Ogden*, 27 App. Div. 214. 50 N. Y. Supp. 650.

¹⁵⁷*Benedict v. Sliter*, 82 Hun. 190, 69 N. Y. S. R. 1, 31 N. Y. Supp. 413. ¹⁶¹*Darling v. Halsey*, 2 Abb. N. C. 105.

¹⁵⁸*Patterson v. Buchanan*, 40 App. Div. 493, 29 N. Y. Civ. Proc. Rep. 238, 58 N. Y. Supp. 179. ¹⁶²*Boyd v. Wilkin*, 23 How. Pr. 137. ¹⁶³*Hyland v. Carpenter*, 20 N. Y. Week. Dig. 261.

¹⁵⁹*Darling v. Halsey*, 2 Abb. N. C. 105.

when the executor denies the justice of the entire claim, but upon the trial it is reduced only about one fifth.¹⁶⁴ A reduction of the claim from \$196 to \$178.50 is not such a reduction as to deprive the plaintiff of costs.¹⁶⁵

p. Failure to file consent that the claim may be heard on judicial settlement.—The commencement of an action upon a claim within five months and twenty days after its rejection is a waiver by the plaintiff of his right to costs in case he is successful.¹⁶⁶

There is a special term decision which holds that an executor, to relieve himself from costs, must file his consent, as provided in § 1822 of the Code of Civil Procedure, within five months and twenty days after his rejection of the claim, although before the expiration of that time an action has been commenced thereon.¹⁶⁷

q. Costs upon a statutory reference.—Parties still have a right to settle their disputes by a reference. But a refusal to refer does not make the defendant liable for costs. The referee has now the power to pass upon the question of costs, subject to the qualification in §§ 1835 and 1836 of the Code of Civil Procedure. The reference is an action, and judgment may be entered upon the report of the referee without an application to the court; and the practice on appeal from his decision is the same as in other civil actions.¹⁶⁸ The discretion of the referee relates only to the costs of the plaintiff. When the executor wins, he is entitled to costs, as a matter of right.¹⁶⁹ Under the old law.

¹⁶⁴*Fort v. Gooding*, 9 Barb. 371.

¹⁶⁵*Dukelow v. Scarles*, 48 N. Y. S. R. 91, 20 N. Y. Supp. 348.

¹⁶⁶*Hart v. Hart*, 45 App. Div. 280, 61 N. Y. Supp. 131; *Hoye v. Flynn*, 30 Misc. 636, 64 N. Y. Supp. 252.

¹⁶⁷*De Kalb Ave. M. E. Church v. Kelk*, 30 Misc. 367, 62 N. Y. Supp. 393.

¹⁶⁸Code Civ. Proc. § 2718; *Ellis v. Filon*, 85 Hun. 485, 66 N. Y. S. R.

764, 33 N. Y. Supp. 138; *Niles v.*

Crocker, 88 Hun. 312, 68 N. Y. S. R.

579, 34 N. Y. Supp. 761; *Winne v.*

Hills, 91 Hun. 92, 71 N. Y. S. R. 702,

36 N. Y. Supp. 683; *Jenkinson v.*

Harris, 27 Misc. 714, 59 N. Y. Supp.

548; *Fisher v. Bennett*, 21 Misc. 178,

47 N. Y. Supp. 114; *Carter v. Barn-*

num, 24 Misc. 220, 53 N. Y. Supp.

539.

¹⁶⁹*Adams v. Olin*, 78 Hun. 309, 66

costs to a successful defendant rested in the discretion of the court, and as it was a special proceeding, and not an action, application had to be made to the court.¹⁷⁰ A motion to confirm a referee's report is now improper; the court cannot review the referee's decision, and hence cannot confirm it.

Where the referee has not passed upon the question of costs, the court, under § 1836 of the Code of Civil Procedure, may pass on that question.¹⁷¹ The certificate of the referee, as provided for in §§ 1835 and 1836 of the Code of Civil Procedure, must still be given, or else the plaintiff cannot be allowed his costs.¹⁷² The certificate of the referee is a different paper from his report, and he may give it after he has filed his report. Section 3248 of the Code of Civil Procedure regulates the giving of this certificate.¹⁷³ If the plaintiff recovers, he is entitled to his disbursements under § 317 of the Code of Procedure, as that part of the section has not been repealed.¹⁷⁴ It was held, when these proceedings were under the Revised Statutes, that an extra allowance could not be granted herein, as this was a special proceeding, and not an action.¹⁷⁵

N. Y. S. R. 695, 29 N. Y. Supp. 131; 560, 61 N. Y. Supp. 953; *Carter v. Winne v. Hills*, 91 Hun. 89, 71 N. Y. *Beckwith*, 104 N. Y. 236; 10 N. E. S. R. 702, 36 N. Y. Supp. 683. 350.

¹⁷⁰*Radley v. Fisher*, 24 How. Pr. ¹⁷⁴*Whitecomb v. Whitcomb*, 92 Hun. 404; *Babbage v. Webster*, 72 Hun, 443, 36 N. Y. Supp. 607; *Lar- 456, 25 N. Y. Supp. 300; Walker v. kins v. Maxon*, 103 N. Y. 630, 1 Silv. *Gardener*, 8 Misc. 468, 60 N. Y. S. R. Ct. App. 215, 11 N. Y. Civ. Proc. Rep. 298, 25 N. Y. Week. Dig. 39, 3 599, 29 N. Y. Supp. 669.

¹⁷¹*Jenkinson v. Harris*, 27 Misc. N. Y. S. R. 642, 9 N. E. 56. Approv- 714, 59 N. Y. Supp. 548; *Fisher v. ing Krill v. Brownell*, 40 Hun, 72; *Bennett*, 21 Misc. 178, 47 N. Y. Supp. *Sutton v. Newton*, 15 Abb. N. C. 452, 2 How. Pr. N. S. 56, 7 N. Y. Civ. 114.

¹⁷²*Re Raab*, 47 App. Div. 33, 62 N. Proc. Rep. 333; *Hall v. Edmunds*, 67 Y. Supp. 332; *Whitcomb v. Whit- How. Pr. 202; Overheiser v. More- comb*, 92 Hun, 443, 71 N. Y. S. R. house, 16 Abb. N. C. 208, 2 How. Pr. 661, 36 N. Y. Supp. 607; *Henning v. N. S. 257, 8 N. Y. Civ. Proc. Rep. Miller*, 83 Hun. 403, 64 N. Y. S. R. 11. Disapproving *Miller v. Miller*, 32 Hun. 481; *Daggett v. Mead*, 11 Abb. N. C. 116.

¹⁷³*Brainerd v. De Graef*, 29 Misc. Dig. 16.

¹⁷⁵*Mowry v. Peet*, 13 N. Y. Week.

That reasoning would not hold now, as the reference is now an action in the supreme court. This allowance may be granted by the court at special term.¹⁷⁶

r. Costs upon a statutory reference, where the plaintiff recovers less than \$50.—A statutory reference is now an action in the supreme court, and is governed in the matter of costs the same as all other actions in that court, except that the plaintiff's right to costs is limited by §§ 1835 and 1836 of the Code of Civil Procedure. If a creditor consents to a reference of a disputed claim and recovers less than \$50, he is liable for costs. The amendment of subd. 5 of § 2863 of the Code of Civil Procedure by the Laws of 1895 allows an action to be brought against an executor or administrator in a justice's court, where the amount of the claim is less than \$50 and the claim has been duly presented to the executor or administrator and rejected by him.¹⁷⁷ Where the plaintiff presented a claim of \$114, which was rejected and referred, and the executor pleaded, as a counterclaim, a claim that she had against the plaintiff and a third party, jointly and severally, and thus reduced the plaintiff's recovery below \$50, the plaintiff was held entitled to costs, because he could not have commenced his action in a justice's court.¹⁷⁸

It has been held that where an action is commenced upon a claim of more than \$50 though the recovery is less than that amount, the plaintiff is entitled to costs, if the proper certificate of the presentation and rejection is procured. In the absence of such certificate the plaintiff cannot be allowed his costs, nor can the defendant.¹⁷⁹

The plaintiff should not be allowed costs unless he recovers \$50, or a sum which added to any counterclaim independent of the cause of action, which he has liquidated in the action, equals

¹⁷⁶*Fisher v. Bennett*, 21 Misc. 178, 47 N. Y. Supp. 114.

¹⁷⁸*German-American Provision Co. v. Garrone*, 73 App. Div. 409, 77 N. Y. Supp. 134.

¹⁷⁷*Lamphere v. Lamphere*, 54 App. Div. 17, 66 N. Y. Supp. 270.

¹⁷⁹*Osborne v. Parker*, 66 App. Div. 277, 72 N. Y. Supp. 894.

\$50. The plaintiff should not be allowed the right to bring an executor into a court of record upon a claim upon which there is less than \$50 due, and compel him to pay the costs in that court. If this is the law a plaintiff can, by increasing his claims above \$50 compel the executor to pay a sum in excess of what he believes is proper, either as blackmail, or as costs in an action in a court of record. Costs against an executor of an insolvent estate must be paid in full, and the judgment creditor will not be compelled to accept a *pro rata* part of them.¹⁸⁰

s. Costs upon appeals.—The protection of the statute is given to the executor upon successful appeals taken by him. If he secures a new trial, with costs to abide the event, and upon the new trial again loses, he cannot, in any event, be charged with the costs of his former appeal. He, doubtless, would be compelled to pay the costs of an unsuccessful appeal,¹⁸¹ or of an appeal taken for his own benefit.¹⁸²

¹⁸⁰*Heather's Estate*, 15 Abb. N. C. 194; *Columbian Ins. Co. v. Stevens*, 455. 37 N. Y. 536.

¹⁸¹*Benjamin v. Ver Nooy*, 168 N. Y. 578, 61 N. E. 971.

¹⁸²*Gardner v. Gardner*, 6 Paige,

CHAPTER XVIII.

COSTS IN SURROGATE'S COURT.

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175. Authority to award costs.—The power of the surrogate to grant allowances or costs is derived wholly from statutory provisions.¹

176. By whom paid.—Section 2557 of the Code of Civil Procedure provides by whom costs awarded in the surrogate's court are to be paid. Section 2557 is as follows: "Except where special provision is otherwise made by law, costs awarded by a decree may be made payable by the party personally, or out of

¹*Re Welling*, 51 App. Div. 355, 64 N. C. 289, 1 N. Y. Supp. 17; *Hoyt's* N. Y. Supp. 1025; *McMahon v. Estate*, 5 Dem. 432, 12 N. Y. Civ. Smith, 20 Misc. 305, 45 N. Y. Supp. Proc. Rep. 208, 26 N. Y. Week. Dig. 662; *Re Denike*, 48 Hun, 606, 21 Abb. 373, 8 N. Y. S. R. 786.

the estate or fund, as justice requires; but costs other than actual expenses cannot be awarded to be paid out of an estate or fund which is less than \$1,000 in amount or value." Sections 2558 and 2566 of the Code of Civil Procedure govern the question of costs in this court. It is usual to make the costs payable out of the estate or fund, unless the costs are caused by parties not acting in good faith, in which case the costs are imposed upon the party causing the expense. It is to the interest of justice that suspicious matters should not pass unchallenged, and where the contestant has reasonable grounds for contesting a matter, costs will not be imposed on him.² A party who mistakes his remedy and makes unnecessary costs to the administrator is properly chargeable with costs.³ Costs should not be allowed against the mother of an infant, where she was cited to appear upon an application for the appointment of a guardian of the person of the infant. She is not a party to the proceedings so as to subject herself to costs.⁴

177. How the discretion of the surrogate is reviewed.—The discretion of the surrogate is not reviewable by the court of appeals,⁵ nor by the supreme court, unless there has been an abuse of discretion and a violation of justice; and the order which reverses the exercise of the discretion of the surrogate must show that the ground of the reversal was the abuse of discretion by the surrogate.⁶ But the appellate division of the supreme court has power, when it modifies a decree of the surrogate, to determine whether a party should be allowed costs in the surrogate's court. But the court of appeals has no jurisdiction to review

²*Powell's Estate*, 5 Dem. 231, 5 N. Y. S. R. 348; *Re Keeler*, 2 Connolly, 6 Am. St. Rep. 405, 18 N. Y. S. R. 45, 23 Abb. N. C. 376, 18 N. Y. Civ. 210, 18 N. E. 110.

³*Re Killan*, 66 App. Div. 312, 72 N. Y. Supp. 199.

⁴*Re Killan*, 66 App. Div. 312, 72 N. Y. Supp. 199.

⁵*Re Killan*, 66 App. Div. 312, 72 N. Y. Supp. 199.

⁶*Re Killan*, 66 App. Div. 312, 72 N. Y. Supp. 199.

the discretion of the supreme court in such a case.⁷ This is on the ground that the discretion of one court cannot be reviewed by another court, unless there has been an abuse of discretion, or the court below has declined to exercise its discretion on the ground that it has no discretion in the premises.

178. Costs on probate of will.—Parties who contest the probate of a will without any reasonable ground and hope of success will be charged personally with the costs of the contest.⁸ No contest is needed to ascertain whether a will was properly executed or not; that can be discovered upon the examination of the witnesses to the will, when the will is offered for probate.⁹ In case of palpable bad faith and fraud on the part of the attorney or counsel, either or both may be made to pay the costs personally.¹⁰ No *per diem* allowance can be made for preparation for trial in these proceedings.¹¹ It is not absolutely necessary that the contestant be guilty of lack of good faith to make him liable personally for costs. The court may award costs against him personally by way of indemnity to the successful party.¹²

Section 2558 of the Code of Civil Procedure prohibits the allowance of costs to an unsuccessful contestant of a will, unless he is the special guardian of an infant. If the infant becomes of age during the contest the guardian can receive compensation up to that time, but not longer. The consent or stipulation of the proponent will not confer jurisdiction upon the surrogate to make such an allowance.¹³ Costs to a special guardian of an in-

⁷*Re Denton*, 137 N. Y. 428, 51 N. Y. S. R. 60, 33 N. E. 482.

¹⁰*Re Tacke*, 17 N. Y. S. R. 805, 3 N. Y. Supp. 198.

⁸*Castle's Estate*, 15 N. Y. Civ. Proc. Rep. 276, 17 N. Y. S. R. 810, 2 N. Y. Supp. 638; *Re Fuller*, 16 N. Y. Civ. Proc. Rep. 412, 22 N. Y. S. R. 352, 5 N. Y. Supp. 460; *Re Whelan*, 6 Dem. 425, 15 N. Y. Civ. Proc. Rep. 273, 17 N. Y. S. R. 772, 2 N. Y. Supp. 635.

¹¹*Re Aaron*, 5 Dem. 362, 25 N. Y. Week. Dig. 324, 7 N. Y. S. R. 735.

¹²*Re Seagrist*, 1 App. Div. 615, 73 N. Y. S. R. 88, 37 N. Y. Supp. 496.

¹³*Re Keeler*, 2 Connolly, 45, 23 Abb. N. C. 376, 18 N. Y. Civ. Proc. Rep. 30, 26 N. Y. S. R. 90, 7 N. Y. Supp. 199.

⁹*Re Whelan*, 6 Dem. 425, 15 N. Y. Civ. Proc. Rep. 273, 17 N. Y. S. R. 772, 2 N. Y. Supp. 635.

fant upon an unsuccessful contest of a will cannot exceed \$70 and \$10 per day for all the days, less two, necessarily occupied in the trial, and disbursements.¹⁴ By section 2558 costs upon an unsuccessful attempt to have a will admitted to probate may be allowed to the proponent when he is named in the alleged will as the executor thereof, and he has taken his proceedings in good faith.

One who finds a will which he is interested in establishing should offer it for probate, and he will not be charged personally with the costs in case of failure.¹⁵

179. Costs on probate of lost will.—A proponent of an alleged lost will is properly chargeable with the costs to each of the contestants of the proceedings, when he commenced the proceedings without any knowledge or evidence to sustain his contention, trusting to chance for their development.¹⁶

180. Application to revoke the probate of a will.—The same rule as to costs that applies upon the probate of a will applies upon the application to revoke the probate of a will. If the proceedings are not brought in good faith, costs will be charged upon the party instituting them.¹⁷

181. Granting and revoking letters of administration.—Costs may be imposed upon a contestant to the appointment of an administrator, when the contest is not conducted in good faith.¹⁸ In revoking letters of administration the administrator will be allowed his costs in opposing the proceedings, when he had good reason to think that he was justified in so doing, the surrogate and the general term both holding with him.¹⁹ A temporary administrator may be authorized by an order of the surrogate

¹⁴*Forster v. Kane*, 1 Dem. 67; *Re Tracy*, 18 Abb. N. C. 242; Code Civ. Proc. §§ 2558, sub. 3, 2561, and 3256. ¹⁵*Re Lowman*, 1 Misc. 43, 22 N. Y. Supp. 1055; *Henry's Estate*, 5 Dem. 272, 5 N. Y. S. R. 344.

¹⁶*Re Griswold*, 15 Abb. Pr. 299.

¹⁸*Re Clark*, 15 N. Y. Supp. 370.

¹⁷*Collyer v. Collyer*, 17 Abb. N. C. 328, Affirmed in 110 N. Y. 481, 6 Am. St. Rep. 425, 18 N. E. 110; *Hauselt v. Vilmar*, 76 N. Y. 630. ¹⁹*Re Page*, 107 N. Y. 266, 14 N. E.

to pay the expenses of his administration of the trust, or the stenographer's or referee's fees on contest of a will or administration;²⁰ but he cannot be ordered to pay the costs incurred upon the attempt to prove alleged wills,²¹ nor the costs incurred upon the probating of the will of the deceased,²² nor the costs of a contested proceeding for the grant of letters of administration.²³

182. Allowances upon an accounting.— The costs of a contest upon an accounting are in the discretion of the surrogate, both as to the amount and by whom payable, within the limits imposed by §§ 2561 and 2562 of the Code of Civil Procedure.²⁴ The allowances for legal services upon an accounting where there is no contest is not to exceed \$25, where there is a contest, the allowance cannot exceed \$70 and \$10 for each day in excess of two.²⁵

An executor or administrator may be allowed a sum not to exceed \$10 per day for time necessarily spent in preparing his account for settlement, or otherwise preparing for trial.²⁶ The *per diem* allowance can only be granted for the time actually and necessarily occupied upon the trial, or preparation therefor, or to an executor or administrator in preparing his accounts for settlement.²⁷ The time occupied in the summing up of counsel is within the meaning of § 2561 of the Code of Civil Procedure.²⁸ But the time spent in preparing pleadings, making briefs, ascertaining facts, appearing upon an adjournment, or appearing to settle a decree, is no part of the trial within the meaning of the Code of Civil Procedure.²⁹

²⁰ Code Civ. Proc. § 2672.

²¹ *Re Aaron*, 5 Dem. 362, 25 N. Y. Week. Dig. 324. 7 N. Y. S. R. 735.

²² *Re Parish*, 29 Barb. 627.

²³ *Re Badger*, 7 Month. L. Bull. 71.

²⁴ *Re Collamer*, 5 N. Y. S. R. 197; *Re Dodge*, 40 Hun, 443.

²⁵ Code Civ. Proc. § 2561.

²⁶ Code Civ. Proc. § 2562; *Walton*

v. Howard, 1 Dem. 103; *Re Miles*, 5

Redf. 110, 3 Month. L. Bull. 39;

Fernbacher's Estate, 4 Dem. 227, 17

Abb. N. C. 339, 8 N. Y. Civ. Proc.

Rep. 349.

²⁷ *Wither's Estate*, 2 N. Y. Civ.

Proc. Rep. (Browne) 162.

²⁸ *Du Bois v. Brown*, 1 Dem. 317.

²⁹ *Du Bois v. Brown*, 1 Dem. 317.

An executor or administrator will not be charged with costs, unless he has been at fault.³⁰ The fact that an accounting is compulsory is not sufficient to charge an executor or administrator with the costs of the accounting. The estate will be charged with the expense of such an accounting when it is for the best interest of the estate that there should be an accounting, and upon such an accounting matters are found correct, although somewhat mixed.³¹ No allowance can be made to legatees or their attorneys for services, where they were not the successful parties upon an accounting, in either surcharging the account, or having some item disallowed.³² If they succeed, they should be allowed costs.³³ An executor or administrator will be charged personally with costs where he has failed to keep books and has refused to make an accounting until compelled to do so, and then his account is surcharged with a large amount.³⁴ Where the decedent divided up his property into two parts, giving the real estate to one class and the personal property to another, and there are two executors, one of whom has taken charge of the personal property and the other of the real estate, and each executor makes a separate account, each class must bear the expenses of the accounting of its fund.³⁵

An executor or administrator is not chargeable personally with costs where, upon an accounting, he called the court's attention to the fact that there was a question as to the legitimacy of one of the children.³⁶ An executor or administrator who has not acted in bad faith, but did not understand his duties, will not be charged with costs.³⁷

³⁰*Griffith v. Beecher*, 10 Barb. 432. N. Y. Supp. 140; *Willcox v. Smith*,

³¹*Willett's Estate*, 15 N. Y. Civ. 26 Barb. 316.

Proc. Rep. 284, 2 N. Y. Supp. 665. ³²*Re Mansfield*, 10 Misc. 296, 64 N.

³³*Re Welling*, 51 App. Div. 355, 64 Y. S. R. 309, 31 N. Y. Supp. 84.

N. Y. Supp. 1025. ³⁴*Re Laramie*, 2 Silv. Sup. Ct. 539,

³⁵*Re Goetschius*, 3 Misc. 155, 23 N. 24 N. Y. S. R. 702, 6 N. Y. Supp. 175.

Y. Supp. 975; *Willcox v. Smith*, 26 ³⁷*Re Swart*, 2 Silv. Sup. Ct. 585, 25

Barb. 316; *Re Meeker*, 9 Daly, 556. N. Y. S. R. 88, 6 N. Y. Supp. 608.

³⁶*Re Matthewson*, 8 App. Div. 8, 40

The mere fact that the objectors upon a testamentary accounting are, in the main, unsuccessful is not sufficient to charge them with costs. Their proceedings must also be characterized by bad faith.³⁸ Objections made to an account for the purpose of delay are sufficient to charge the objectors with costs.³⁹ The expense of an accounting caused by an executor, administrator, or general guardian of an infant, either for his own convenience,—as, when he resigns,—⁴⁰or by his delinquencies,—as, when he is removed,—should be borne by him personally.⁴¹ He will also be called to pay the expense of an accounting which he unduly prolongs.⁴² But the expenses of an accounting which he did not ask and to which he was compelled to submit will not be charged against him, when the entire matter is dismissed for lack of jurisdiction.⁴³

The costs of proceedings to remove an executor or administrator on account of wasteful and improvident management of the estate is properly chargeable against him.⁴⁴

An executor or administrator is properly chargeable with the costs of an accounting when he has denied the possession of the property which the accounting shows him to have,⁴⁵ or has sought to convert the estate to his own use.⁴⁶ He is also chargeable with costs of an unsuccessful appeal from a decision of the surrogate, which finds that the mortgage, which he claims personally, belongs to the estate;⁴⁷ or of an appeal from a decision

³⁸*Willett's Estate*, 15 N. Y. Civ. Proc. Rep. 284, 2 N. Y. Supp. 665.

³⁹*Re Vandervoort*, 19 N. Y. Civ. Proc. Rep. 355, 33 N. Y. S. R. 644, 11 N. Y. Supp. 764.

⁴⁰*Re Selling*, 6 Dem. 428, 15 N. Y. Civ. Proc. Rep. 279, 17 N. Y. S. R. 801, 2 N. Y. Supp. 637.

⁴¹*Stanton's Estate*, 1 Connolly, 108, 18 N. Y. S. R. 807, 2 N. Y. Supp. 342.

⁴²*Re Jones*, 4 Sandf. Ch. 615; *Re Lamb*, 50 N. Y. S. R. 343, 21 N. Y. Supp. 343; *Re Dixon*, 50 N. Y. S. R. 629, 21 N. Y. Supp. 343; *Re Decker*, 37 Misc. 527, 76 N. Y. Supp. 315.

⁴³*Re Mull*, 16 N. Y. S. R. 981, 2 N. Y. Supp. 23; *Re Gabriel*, 60 N. Y. Supp. 87.

⁴⁴*Re Berier*, 17 Misc. 486, 41 N. Y. Supp. 268.

⁴⁵*Re Post*, 30 Misc. 551, 64 N. Y. Supp. 369.

⁴⁶*Re Williams*, 1 Connolly, 99, 15 N. Y. Civ. Proc. Rep. 270, 17 N. Y. S. R. 839, 2 N. Y. Supp. 669.

⁴⁷*Re Manhardt*, 17 App. Div. 1, 44 N. Y. Supp. 836.

of the surrogate when the appeal is without merit;⁴⁸ or where the contest is caused on account of the incorrect accounts filed by him, and by reason of maladministration of the estate, although it was done through ignorance.⁴⁹

An executor, administrator, or general guardian of an infant will also be charged with costs when he files an incorrect account and refuses to explain the items thereof, and delays matters as much as he can.⁵⁰

The paying of claims barred by the statute is such maladministration as will charge the executor or administrator with the costs of the accounting.⁵¹ Costs are properly chargeable upon the sureties of one executor who has sought and failed to charge his coexecutor with certain items.⁵² They are also properly chargeable upon a petitioner who has no interest in the matter, and seeks to have an executor removed.⁵³

183. Allowances when the estate is less than \$1,000 in amount.

—No allowance other than actual expenses can be awarded or paid out of an estate or fund which is less than \$1,000 in amount or value.⁵⁴ To determine the amount of the estate to ascertain whether it comes under the provisions of § 2557 of the Code, the gross amount of the estate at the time of the owner's death is added to any increase up to the time of the accounting.⁵⁵

184. How costs awarded in the surrogate's court are collected.—

The right to issue an execution to collect costs decreed to be paid by the contestant personally is not lost by reason of the payment of such costs out of the estate, by the consent of all parties, pend-

⁴⁸*Re McCarter*, 94 N. Y. 558.

Rep. 282, 17 N. Y. S. R. 832, 2 N. Y. Supp. 495.

⁴⁹*Re Kopp*, 15 N. Y. Civ. Proc. Rep. 282, 17 N. Y. S. R. 832, 2 N. Y. Supp. 495.

⁵¹*Re Gladke*, 60 N. Y. Supp. 869.

⁵²*Re Adams*, 51 App. Div. 619, 64 N. Y. Supp. 591.

⁵⁰*Williams' Estate*, 1 Connolly, 99, 15 N. Y. Civ. Proc. Rep. 270, 17 N. Y. S. R. 839, 2 N. Y. Supp. 669; *Re Decker*, 37 Misc. 527, 76 N. Y. Supp. 315; *Re Kopp*, 15 N. Y. Civ. Proc.

⁵³*Shook v. Shook*, 19 Barb. 653.

⁵⁴Code Civ. Proc. § 2557.

⁵⁵*Chalker v. Chalker*, 5 Redf. 480.

ing an appeal.⁵⁶ An execution to collect costs ordered to be paid by two executors to a third should run against the two executors, and not against all three.⁵⁷ An executor or administrator who fails to pay costs awarded against him in a representative capacity will be charged personally with the costs of a motion to compel him to do so.⁵⁸

The surrogate cannot, by contempt proceedings, compel the payment of costs decreed by him to be paid by the executor or administrator personally.⁵⁹ Nor can he enforce the payment of costs by imprisonment, as that is prohibited by § 15 of the Code of Civil Procedure. Section 2555 does not give that authority where it is to enforce the payment of costs only, although if the costs were included in a decree providing for the payment of money, the entire decree might be enforced by imprisonment for contempt of court.⁶⁰ The nonpayment of costs of motion does not affect a stay of proceedings, because § 779 of the Code of Civil Procedure does not apply to surrogates' courts.⁶¹

185. To whom costs are awarded.—Costs are always allowed to the parties, and not to the attorneys.⁶² The power of a surrogate to award costs on a will contest, to be paid out of the estate, is limited to the executor propounding the will, an unsuccessful contestant who is a guardian for an infant, and the successful parties. An infant represented by an attorney cannot be allowed costs.⁶³

⁵⁶*Bartlett's Estate*, 18 N. Y. Week. Dig. 65. 2 N. Y. Civ. Proc. Rep. 162; *DuBois v. Brown*, 1 Dem. 317, 65 How. Pr. 461; *Derin v. Patchin*, 26 N. Y. 441,

⁵⁷*Eisner v. Arcry*, 2 Dem. 466. 25 How. Pr. 5; *Re Crane*, 68 App. Div. 355, 74 N. Y. Supp. 88; *Re Well-*

⁵⁸*Re Curry*, 47 N. Y. S. R. 307, 19 N. Y. Supp. 728. 51 App. Div. 355, 64 N. Y. Supp. 1025; *Seaman v. Whitehead*, 78 N.

⁵⁹*Re Fechan*, 36 Misc. 614, 73 N. Y. Supp. 1126. Y. 306; *Re Goetschius*, 3 Misc. 155, 23 N. Y. Supp. 975; *Willcox v. Smith*, 26 Barb. 316; *Walton v. Howard*, 1 Dem. 103; *McMahon v. Smith*, 20 Misc. 305, 45 N. Y. Supp. 663.

⁶⁰*Re Humfreville*, 154 N. Y. 115, 47 N. E. 1086; *Re Fechan*, 36 Misc. 614, 73 N. Y. Supp. 1126. ⁶¹*Re Hitchler*, 25 Misc. 369, 55 N. Y. Supp. 640; *Aaron's Estate*, 5 Dem. 362, 25 N. Y. Week. Dig. 324. ⁶²*Re Lamb*, 22 N. Y. S. R. 351, 57 N. Y. S. R. 735; *Withers' Estate*, N. Y. Supp. 565.

This is on the principle that the executor has employed the attorney, to whom he is personally responsible, and this expense, like all others, should be paid by the estate.⁶⁴ There is, however, no personal liability upon the part of an executor to his attorney in probating a will, when it provides that the cost of probating it shall be a charge upon the estate.⁶⁵ An executor's or administrator's liability to his attorney is not measured by the allowance of the surrogate. It may well be more than the allowance, but it can never be less, because an allowance will not be made to the executor or administrator until he has actually paid his attorney's bill and asks for reimbursement.⁶⁶ Payment by a note indorsed by a third person is not an actual payment, and the executor or administrator cannot be allowed for services thus paid.⁶⁷ If the executor or administrator is financially irresponsible a payment of his attorney by his notes will not be sufficient, and his claim for repayment will be refused.⁶⁸ But if the surrogate orders the payment to the attorney the parties may acquiesce in it. They can review such an order by an appeal only, not by a motion to vacate that part of the order.⁶⁹ An executor or administrator who is an attorney cannot receive compensation for his own legal services rendered to the estate.⁷⁰

The court will first inquire whether the executor or administrator had a right to incur the expense, and if that is decided in the affirmative, then whether the sum that he did expend is reasonable in amount.⁷¹ An action to construe the will of the de-

⁶⁴*Gilman v. Gilman*, 6 Thomp. & C. 211. Affirmed in 6 N. Y. 41; *Seaborn v. Whitehead*, 78 N. Y. 306.

⁶⁵*Boynton v. Laddy*, 32 N. Y. S. R. 578, 10 N. Y. Supp. 622.

⁶⁶*Heather's Estate*, 15 Abb. N. C. 194; *Re Bailey*, 47 Hun, 477; *Re O'Brien*, 5 Misc. 136, 25 N. Y. Supp. 704; *Re Van Nostrand*, 3 Misc. 396, 24 N. Y. Supp. 850.

⁶⁷*Re Blair*, 28 Misc. 611, 59 N. Y. Supp. 1090.

⁶⁸*Re Bailey*, 47 Hun, 477; *Shields v. Sullivan*, 3 Dem. 296.

⁶⁹*Marsh v. Avery*, 81 N. Y. 29.

⁷⁰*Re Reed*, 12 N. Y. S. R. 139; *Collier v. Munn*, 41 N. Y. 143; *Morgan v. Hannas*, 13 Abb. Pr. N. S. 361; *Campbell v. Purdy*, 5 Redf. 434; *Re Van Wert*, 3 Misc. 563, 24 N. Y. Supp. 719; *Valentine's Estate*, 9 Abb. N. C. 313.

⁷¹*Re Hutchinson*, 84 Hun, 563, 66 N. Y. S. R. 149, 32 N. Y. Supp. 869.

ceased, or for a partition of his real estate which involves the construction of the will, are proper cases for the executor to retain counsel.⁷² Costs may be allowed upon the probate of a will to the successful contestants upon the construction of the will.⁷³

An allowance to contestants upon their success in the surrogate's court will not be disturbed by the appellate court when it reverses the decree of the surrogate, if the granting of the costs were acquiesced in by the opposite party, both as to the power of the court to make it and the amount.⁷⁴ Under subd. 3 of § 2558 of the Code of Civil Procedure the surrogate, when two wills of the same testator are offered for probate, has the power to allow costs to the executor named in the will that he does not admit to probate.⁷⁵

186. Costs upon the removal of an executor.—In a proceeding to remove an executor the authority of the surrogate in the allowance of costs is limited by the restrictions of § 2561 of the Code of Civil Procedure.⁷⁶ Costs cannot be awarded to an unsuccessful petitioner.⁷⁷ The executor upon such a proceeding is properly chargeable with the costs, when the proceeding is based upon his business inexperience and the large interests in his hands, and his refusal to file a bond under the provisions of § 2686 of the Code of Civil Procedure,⁷⁸ or where his conduct has been reckless and careless.⁷⁹

An executor is protected in paying costs as directed by the surrogate, if he does so before the appeal is perfected. If there is no appeal from that part of the order awarding costs, then as

⁷²*Re Hutchinson*, 84 Hun, 563, 66 N. Y. S. R. 149, 32 N. Y. Supp. 869; *Noyes v. Blakeman*, 3 Sandf. 531; *Irving v. De Kay*, 9 Paige, 521; *Wetmore v. Parker*, 52 N. Y. 450.

⁷³*Re Munter*, 19 Misc. 201, 44 N. Y. Supp. 605.

⁷⁴*Re Bogart*, 46 App. Div. 240, 61 N. Y. Supp. 671.

⁷⁵*Re Mondorf*, 110 N. Y. 450, 18 N. E. 256.

⁷⁶*Fernbacher's Estate*, 4 Dem. 227, 17 Abb. N. C. 339, 8 N. Y. Civ. Proc. Rep. 349; *Walton v. Howard*, 1 Dem. 103; *DuBois v. Brown*, 1 Dem. 317, 65 How. Pr. 461.

⁷⁷*Re Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551.

⁷⁸*Re O'Brien*, 45 N. Y. S. R. 180, 19 N. Y. Supp. 541.

⁷⁹*Re Stanton*, 1 Connolly, 108, 18 N. Y. S. R. 807, 2 N. Y. Supp. 342.

to that part the decree is final and the executor is not only justified in paying such, but he is bound to do so. If the appellate court reverses the decree of the surrogate, the executor cannot be held for the sum thus paid.⁸⁰

187. Costs upon an appeal from the surrogate's court.—Costs upon an appeal from the surrogate's court are governed by §§ 2560 and 2589 of the Code of Civil Procedure, which are as follows: Sec. 2560. "Where a question of fact has been tried by a jury, the costs awarded against the unsuccessful party are the same as the taxable costs of an action in the supreme court. The costs of an appeal, where they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court."

Sec. 2589. "The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court: or, if such a direction is not given, as directed by the surrogate."

Under these sections, costs cannot be allowed, on appeal, to the contestants who are unsuccessful.⁸¹ But the reasonable expenses of an executor or administrator in appealing from a judgment which swept away the entire estate are properly allowed by the surrogate.⁸²

The court may, in its discretion, order the costs of one party on appeal paid by another who has occasioned them.⁸³ Upon reversing a decree of the surrogate admitting a will to probate and sending the matter to a jury, it is proper to make the costs of the appeal abide the event of the trial, and payable out of the

⁸⁰*Re Eastman*, 25 N. Y. Week. Dig. 397.

⁸¹*Re Budlong*, 100 N. Y. 203, 3 N. E. 334; *Re Wilson*, 103 N. Y. 374, 8 N. E. 731.

⁸²*Re Ritch*, 76 Hun. 36, 59 N. Y. S. R. 623, 27 N. Y. Supp. 616.

⁸³*Re Martin*, 98 N. Y. 193.

estate.⁸⁴ Costs may be allowed to both parties, payable out of the estate, when the executor or administrator appeals from an adverse judgment and is defeated;⁸⁵ or where both parties are successful upon the appeal, the respondent in upholding the principle of the judgment of the lower courts, and the appellant in reversing the judgment for lack of proof;⁸⁶ or where there is probable cause for taking the appeal, but the judgment is affirmed.⁸⁷ Where two parties appear in the surrogate's court by different attorneys, who are partners, and take separate appeals, when one appeal would have protected their rights, upon reversal only one bill of costs can be taxed.⁸⁸ But where the attorneys were not partners and there is no charge that there was a device to increase costs, both attorneys are allowed to tax full costs.⁸⁹ Executors or administrators will be charged personally with the costs of an unsuccessful appeal taken by them from a ruling of the surrogate which reduced the allowance of their commissions.⁹⁰

If no costs are allowed to an executor or administrator on an appeal from a former decree, none can be allowed by the surrogate upon the final accounting. Such costs are in the discretion of the appellate court, and if none are allowed by that court, they are not chargeable against the estate.⁹¹

The expenses of an executor, including additional counsel in an unsuccessful appeal to the court of appeals, may be allowed where the general term has reversed a decree of the surrogate

⁸⁴*Re Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *Re Van Houten*, 11 App. Div. 203, 42 N. Y. Supp. 919; *Re Dixon*, 42 App. Div. 489, 59 N. Y. Supp. 421. *Crafts v. Rockefeller*, 6 How. Pr. 9; *Ten Broeck v. Paige*, 6 Hill, 267; *Castellanos v. Beauville*, 2 Sandf. 670; *Braden v. Kakhaizer*, 3 Sandf. 760.

⁸⁵*Shakespeare v. Markham*, 72 N. Y. 400. ⁸⁶*Depuy v. Wurts*, 47 How. Pr. 225; *Savage v. Gould*, 60 How. Pr. 255; *Seguine v. Seguine*, 3 Abb. Pr. N. S. 442; *Hawley v. Donnelly*, 8 Paige, 415.

⁸⁷*Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681. ⁸⁸*Re Clinton*, 12 App. Div. 132, 42 N. Y. Supp. 674.

⁸⁹*Brookway v. Jewett*, 16 Barb. 590; *Tracy v. Stone*, 5 How. Pr. 104; ⁹⁰*Jacques v. Elmore*, 7 Hun, 675.

admitting the will to probate, and the question is a novel one.⁹² The expense of an appeal taken by an executor or administrator against the allowance of a claim that absorbed the entire estate should be allowed, when the appeal was taken at the request of all the persons interested in the estate, except the owner of the claim.⁹³

188. Affirmance or reversal "with costs" or "without costs."—Upon the decision of an appeal by the appellate division the costs awarded by the surrogate are not affected, unless the order is reversed or modified in respect to costs. Where the appellate division affirmed a decree of a surrogate, "with costs to be paid by the contestants personally," this did not affect the allowance made by the surrogate in the original decree.⁹⁴ It was held in the old general term that a reversal of such a decree "with costs" meant costs in the surrogate's court, as well as on appeal,—that it was the intention of the court to place the contestant in the same position in which he would have been had the surrogate decided correctly and given him costs upon the hearing.⁹⁵ To make an executor personally liable for the costs of an unsuccessful appeal, there must be an express adjudication to that effect; the affirmance of a judgment "with costs" makes the costs payable out of the estate.⁹⁶ Where an order upon a final accounting is affirmed in the appellate division "without costs" the surrogate has no power to open the accounting and allow the executor the expense of the appeal.⁹⁷

The appellate court has, undoubtedly, control over a decree brought before it on appeal. When it disposes of the question of costs in that court, or in the court below, the surrogate can-

⁹²*Re Blair*, 28 Misc. 611, 59 N. Y. Supp. 1090; *Re Hutchinson*, 84 Hun, 183.

563, 32 N. Y. Supp. 869.

⁹³*Re Ritch*, 76 Hun, 36, 59 N. Y. S. R. 623, 27 N. Y. Supp. 613.

⁹⁴*Re Scagrist*, 8 App. Div. 298, 40 N. Y. Supp. 940.

⁹⁵*Re Hood*, 30 Hun, 472.

⁹⁶*Sheldon v. Williams*, 52 Barb.

⁹⁷*Re McEckron*, 55 App. Div. 147,

67 N. Y. Supp. 18; *Reed v. Reed*, 52

N. Y. 651; *Hone v. De Peyster*, 106

N. Y. 645, 649, 13 N. E. 778; *Sheri-*

dan v. Andrews, 80 N. Y. 648.

not alter the decision. Still, the troublesome question to the practitioner is to determine definitely when the court has exercised its power and to what extent. Every court can interpret its own orders, and that interpretation cannot be changed by any other court.

Upon the reversal by the appellate division, "with costs," of an order of the surrogate's court, the successful party cannot tax disbursements. Sections 3251 and 3256 of the Code of Civil Procedure apply to actions, and not to orders in the surrogate's court. The order must contain directions to the clerk to tax the disbursements in order to enable him to tax them. If the successful party desires to tax the disbursements he should move in the appellate division for a resettlement of the order of that court.⁹⁸

Where the supreme court affirms a decision of the surrogate's court, but the court of appeals reverses both judgments and dismisses the proceeding without costs, the appellant is not entitled to costs in any court.⁹⁹

189. Amount of costs on appeal.—Upon an appeal from a decree of a surrogate the same costs will be allowed as upon an appeal from a judgment in the supreme court.¹⁰⁰

The costs of an appeal from an order dismissing the petition and citation requiring the executors or administrators to show cause why they should not file an inventory are \$10 and disbursements. Section 3240 of the Code of Civil Procedure makes the costs in a special proceeding the same as in an action.¹⁰¹

It has been held that, since the amendment of § 318 of the Code of Procedure in 1862, the supreme court had the power to

⁹⁸*Re Steencken*, 58 App. Div. 85, 68 N. Y. Supp. 444; *Cassidy v. McFarland*, 139 N. Y. 209, 54 N. Y. S. R. 605, 34 N. E. 893.

⁹⁹*McGregor v. Buell*, 1 Keyes, 153, 17 Abb. Pr. 31, 3 Abb. App. Dec. 86.

¹⁰⁰Code Civ. Proc. §§ 2560, 2589, 3240; *Cole v. Terpenning*, 27 Hun, 111; *Walsh v. Van Allen*, 36 Hun, 629.

¹⁰¹*Walsh v. Van Allen*, 36 Hun, 629.

make an extra allowance upon an appeal from the surrogate's court.¹⁰²

Where the executor or administrator is defeated upon an appeal upon a technicality, the opposing party will be allowed the costs given him by the appellate court and his disbursements, but no costs in the surrogate's court.¹⁰³

190. Allowances to special guardians.—The amount of costs that a surrogate can allow to a special guardian upon application for probate or revocation of probate of a will is limited by §§ 2561 and 3256 of the Code of Civil Procedure.

It cannot exceed \$25 where there has been no contest, and \$70 where there is a contest, and in addition thereto \$10 per day for every day in excess of two which the hearing occupies.¹⁰⁴

This is properly ordered paid out of the general estate. If the guardian is entitled to any further allowance, it should be paid by the infant or from his estate.¹⁰⁵ The surrogate has the power to make such an allowance out of the infant's estate.¹⁰⁶ But it cannot be made *ex parte*.¹⁰⁷

Where an attorney appears for the general guardian of an infant, and a special guardian is appointed, an allowance will be made to the special guardian, but none will be made to the general guardian.¹⁰⁸

Upon a judicial accounting the surrogate cannot award costs to the special guardian of an infant for services subsequent to

¹⁰²*Seguine v. Seguine*, 3 Abb. Pr. 11; *Re Budlong*, 100 N. Y. 203, 3 N. S. 442; *Dupuy v. Wurts*, 1 Hun. E. 334.

119, 53 How. Pr. 48.

¹⁰³*Re Baldwin*, 30 Misc. 169, 63 N. Y. Supp. 523. Affirmed in 160 N. Y. 448, 55 N. E. 11; *Re Farmers'*

¹⁰⁴*Re Tracy*, 18 Abb. N. C. 242; *Loan & T. Co.* 49 App. Div. 1, 63 N. Y. Supp. 227; *Brinckerhoff v. Farias*, Y. Supp. 118; *Re Robinson*, 40 App. Div. 256, 65 N. Y. Supp. 523, Affirmed in 160 N. Y. 448, 55 N. E. 11. 45 N. Y. S. R. 924. 18 N. Y. Supp. 748.

¹⁰⁵*Re Ruppner*, 7 App. Div. 11, 39 N. Y. Supp. 763; *Re Robinson*, 40 App. Div. 30, 57 N. Y. Supp. 523. Affirmed in 160 N. Y. 448, 55 N. E. 11; *Re Budlong*, 100 N. Y. 203, 3 N. S. 442, E. 334.

¹⁰⁶*Re Mceker*, 9 Daly, 556.

the decision of the court of appeals that the infant has no interest in the personal property.¹⁰⁹

The special guardian is entitled to pay till an appeal is taken. If the infant needs protection on the appeal it is the province of the appellate court to appoint a guardian. If the appellate court makes no formal appointment, but recognizes as guardian the person who acted below, he may become entitled to compensation.¹¹⁰ A special guardian for an infant in an action to construe a will should be allowed only his taxable costs, when it appears that the infant has no interest in the estate.¹¹¹

If the appellate court makes no provision for costs of the special guardian the surrogate cannot make him an allowance for his services on the appeal.¹¹²

191. Amount of costs allowed.—A *per diem* allowance can only be made as indicated in § 2562 of the Code of Civil Procedure, and not for preparing for trial.¹¹³ The same *per diem* allowance, \$10, is made in proceedings before a referee as if the proceedings had been before the surrogate. But there is no provision for a *per diem* allowance for adjournments taken before a referee.¹¹⁴

No more costs can be allowed when two attorneys are employed than where one is employed. In computing the number of days for which an allowance can be made, only the time actually spent on the trial on the merits, including the summing up or argument, can be allowed. The time spent in preparing the pleadings, making briefs, and ascertaining the facts cannot be

¹⁰⁹*Re James*, 78 Hun. 121, 60 N. Y. S. R. 184, 28 N. Y. Supp. 992.

¹¹⁰*Schell v. Hewitt*, 1 Dem. 250, 65

How. Pr. 187, 4 N. Y. Civ. Proc. Rep. 57; *Kellinger v. Roe*, 7 Paige, 362;

Underhill v. Dennis, 9 Paige, 202;

Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec.

225; *Re Marshall*, 19 N. Y. S. R. 152, 2 N. Y. Supp. 863.

¹¹¹*Bindrim v. Ullrich*, 64 App. Div. 444, 72 N. Y. Supp. 239.

¹¹²*Schell v. Hewitt*, 1 Dem. 250, 65 How. Pr. 187, 4 N. Y. Civ. Proc. Rep.

57.

¹¹³*Aaron's Estate*, 5 Dem. 362, 25 N. Y. Week. Dig. 324, 7 N. Y. S. R. 735.

¹¹⁴*Re Clark*, 36 Hun, 301.

included. The executor or administrator, however, can be allowed for the time spent in preparing his account.¹¹⁵

The surrogate cannot make an allowance of costs greater than that provided for in § 2561 of the Code of Civil Procedure. If the services of the attorney for the executor are worth more than those costs, the executor may pay them, as any other disbursement, and if they are proper, he will be allowed them upon his accounting.¹¹⁶ Under an order of reference made under § 2546 of the Code of Civil Procedure, an allowance of only \$25 can be made to the petitioner, as the costs are governed by § 2561, but the remuneration of the special guardian is governed by what his services were worth.¹¹⁷

An application for leave to issue an execution under the provisions of §§ 1380 and 1381 of the Code of Civil Procedure is a special proceeding, and not a motion, the costs of which are governed by § 2561, which provides that costs of \$25 shall be allowed where there is no contest, and \$70 if there is a contest.¹¹⁸

An application to require trustees under a will to make application of the income of an infant's estate to his support is a special proceeding and costs are governed by § 2561 of the Code of Civil Procedure.¹¹⁹

192. What disbursements are allowed.—The amount inserted in an executor's or administrator's bill of costs as disbursements for referee's fees, and properly verified, should not be reduced without counterproof of its incorrectness.¹²⁰

The question of the costs incurred by the executor or administrator in establishing the relationship of various parties to the deceased should be reserved, like any other disbursement, until

¹¹⁵*DuBois v. Brown*, 1 Dem. 317, 65 How. Pr. 461.

¹¹⁶*Re Hitchler*, 25 Misc. 369, 55 N. Y. Supp. 640.

¹¹⁷*Re Rylandce*, 25 Misc. 283, 55 N. Y. Supp. 433.

¹¹⁸*Taylor's Estate*, 8 N. Y. Civ. Proc. Rep. 453.

¹¹⁹*Re McCormick*, 40 App. Div. 73, 57 N. Y. Supp. 548.

¹²⁰*Re Reeves*, 3 Silv. Sup. Ct. 291.

the final accounting.¹²¹ Upon proceedings to admit a will to probate the surrogate has no power to allow \$500 as a fee to an expert witness. He can allow only the ordinary witness fee.¹²² The cost of stenographer's minutes furnished to the contestants under the provisions of § 2558 of the Code of Civil Procedure, upon the application for probate or revocation of probate, are a proper disbursement; but the expense for the stenographer's minutes for examination of a witness *de bene esse*, which were not properly returned and the proper foundation for the reception of which was not laid, are not a proper disbursement.¹²³ The order for the stenographer's minutes, under § 2558, must precede the hearing or no allowance can be made.¹²⁴

An account of an executor or administrator will be opened when an application is made therefor upon the ground of newly discovered evidence upon matters litigated upon the accounting, but this will be granted only on terms. Usually these are the costs allowed upon a contest,—\$70.¹²⁵

193. Disputed claim heard by the surrogate.—In all cases where disputed claims against an estate are submitted to the surrogate for determination upon judicial settlement, pursuant to § 1822 of the Code of Civil Procedure, the allowance or disallowance of the costs to the claimant is a matter within the discretion of the surrogate within the limits of § 2561 of the Code of Civil Procedure. Such discretion should be guided and controlled by the same principles which are applicable to the allowance or disallowance of costs in actions at law against an executor under §§ 1835 and 1836. A claimant may become a party to a final accounting by filing the proper consent, and in a proper case may be allowed costs.¹²⁶

¹²¹*Re Gooseberry*, 52 How. Pr. 310. Supp. 760; *Re Engelbrecht*, 15 App.

¹²²*Re Bender*, 86 Hun, 570, 67 N. Div. 541, 44 N. Y. Supp. 551.

Y. S. R. 682, 33 N. Y. Supp. 907.

¹²⁵*Re McManus*, 35 Misc. 678, 72

¹²³*Re Henry*, 7 N. Y. S. R. 713, 25 N. Y. Supp. 678.

N. Y. Week. Dig. 156.

¹²⁶*Re Ingraham*, 35 Misc. 577, 72

¹²⁴*Re Byron*, 61 Hun. 278, 16 N. Y. N. Y. Supp. 62.

It has been held, however, that §§ 1835 and 1836 of the Code of Civil Procedure have no application to these proceedings, but apply only to actions.¹²⁷

Where the appellate court orders the issues raised upon the probate of a will to be tried by a jury, and makes no award of costs, none can be allowed by the surrogate. His powers under §§ 2558, 2559, and 2560 of the Code of Civil Procedure apply only to those cases where costs are awarded by the appellate court.¹²⁸

It has been held that where the issues are sent to a jury, with costs to the appellant to abide the event, the successful party is entitled to tax all the costs of the proceedings and the action.¹²⁹ Where the supreme court directs that costs be paid to certain parties, which were paid, and upon further appeal this order was reversed, the supreme court can order the costs thus paid to be refunded.¹³⁰

194. Proceedings to sell real estate to pay debts of the decedent.

— The costs and allowances to the petitioning creditor¹³¹ and to a special guardian¹³² in a proceeding to sell a decedent's real estate for the payment of his debts are governed by §§ 2561 and 2563 of the Code of Civil Procedure. No allowance can be made to any creditor other than the petitioning creditor, because no provision is made in § 2793 of the Code of Civil Procedure for such an award.¹³³

Under no circumstances can the costs awarded against an administrator be a charge upon the real estate of the deceased in

¹²⁷*Re Coonley*, 38 Misc. 219, 77 N. Y. S. R. 880, 6 N. Y. Supp. 269.

¹²⁸*Hatten's Estate*, 6 Dem. 444, 15 N. Y. Civ. Proc. Rep. 293, 17 N. Y. S. R. 774, 2 N. Y. Supp. 493; *Shell v. Hewitt*, 1 Dem. 249, 4 N. Y. Civ. Proc. Rep. 57, 65 How. Pr. 187; *Re Campbell*, 48 Hun. 417, 14 N. Y. Civ. Proc. Rep. 400, 28 N. Y. Week. Dig. 400, 16 N. Y. S. R. 483, 1 N. Y. Supp. 231. See *Bull's Estate*, 1 Connolly,

565.
¹²⁹*Moss's Estate*, 24 N. Y. Civ. Proc. Rep. 438, 68 N. Y. S. R. 720, 34 N. Y. Supp. 798.

¹³⁰*Whitbeck v. Patterson*, 22 Barb. 83.

¹³¹*Re Matthewson*, 1 Connolly, 157, 19 N. Y. S. R. 208, 3 N. Y. Supp. 660.

¹³²*Re Dodge*, 40 Hun. 443.
¹³³*Long v. Olmsted*, 3 Dem. 581.

the possession of the heir,¹³⁴— not even the costs of proceedings had in the lifetime of the decedent in an action commenced against him and revived against his administrator.¹³⁵ Costs awarded against a surviving partner in an action upon a partnership debt cannot be paid out of the real estate of a deceased partner.¹³⁶ The question of costs cannot be determined until the proceeds are deposited with the county treasurer and the decree is made for distribution.¹³⁷

The freeholder who sells the property may be allowed a reasonable amount for his services, yet he cannot be allowed such an amount as would exhaust the fund and leave nothing to pay the creditors.¹³⁸ Where the surrogate orders a question of fact arising in a special proceeding for the disposition of real property of a decedent for the purpose of paying his debts, to be determined by a jury the costs are taxed in the surrogate's court, and are the same in amount as if the proceedings had been heard by the surrogate. Code Civ. Proc. § 2547.

Where the costs in an action for admeasurement of dower were ordered paid out of the money received from the sale of the crops raised, and, if that was not sufficient, then out of the real estate sold, the surrogate held that this determination was not *res judicata* as to creditors who were not parties to that action.¹³⁹

195. Allowances upon tax appraisals.— In proceedings to assess the estate of a decedent, where the appointment of a special guardian is wholly unnecessary no allowance can be made to him.¹⁴⁰

¹³⁴*Sanford v. Granger*, 12 Barb. 392; *Wood v. Byington*, 2 Barb. Ch. 387; *Ball v. Miller*, 17 How. Pr. 300; *Hurd v. Callahan*, 5 Redf. 393, 9 Abb. N. C. 374.

¹³⁷*Laird v. Arnold*, 42 Hun, 136.

¹³⁵*Wood v. Byington*, 2 Barb. Ch. 387.

¹³⁸*Re Matthewson*, 1 Connoly, 254, 19 N. Y. S. R. 210, 9 N. Y. Supp. 290.

¹³⁹*Wilcox's Estate*, 11 N. Y. Civ. Proc. Rep. 115.

¹⁴⁰*Re Stowell*, 15 Misc. 533, 25 N. Y. Supp. 1144; *Re Post*, 5 App. Div. Y. Civ. Proc. Rep. 316, 74 N. Y. S. 113, 38 N. Y. Supp. 977, R. 296, 37 N. Y. Supp. 1127.

The allowance of costs to the comptroller by the surrogate in proceedings taken under chapter 399 of the Laws of 1892 is discretionary.¹⁴¹

The district attorney in New York county should, in cases where he is successful, have his costs taxed according to the rules of the surrogate's court. In cases where he is unsuccessful, and deems himself entitled to the certificate provided for in § 15, he must apply to the court for such certificate, showing his non-success, and must furnish evidence to the satisfaction of the surrogate that there was probable cause for issuing the citation and taking the proceedings.¹⁴²

Where the appellate division affirms or reverses, "with costs," a final decision of the surrogate made in a special proceeding to assess a tax upon the property of a decedent, the same costs are awarded as are allowed upon an appeal from a judgment. The successful party may also tax his disbursements, although they were not specified in the order of affirmance or reversal.¹⁴³

¹⁴¹*Re Hoffman*, 76 Hun, 399, 58 N. Y. S. R. 699, 27 N. Y. Supp. 1086. ¹⁴³*Re Babcock*, 86 App. Div. 563.

¹⁴²*McCarthy's Estate*, 5 Misc. 276, 25 N. Y. Supp. 987.

CHAPTER XIX.

OFFER OF JUDGMENT, TENDER, AND PAYMENT.

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196. Offer of judgment; in general.—The statute governing tender and offer of judgment is contained in Code Civ. Proc. §§ 731–740.

The provisions of the Code relating to offers of judgment apply to actions in equity, as well as actions at law.¹ Earlier cases that held otherwise must be deemed to be overruled.²

197. How an offer of judgment should be served.—The statutory requirements must be observed, or the offer may be disregarded.³ An offer which is a nullity may be disregarded.⁴ It is not necessary even to return it.⁵ The statute does not require that the original offer be served,⁶ but the defendant can be compelled to file the original offer if it is important to the plaintiff.⁷ If, however, it should be held that the service of the original is necessary, such service is waived where the original and a copy is handed to the attorney and he hands back the original, with admission of the service of a copy thereof.⁸ If the service of the original is required, the failure to serve the original is an

¹*Singleton v. Home Ins. Co.* 121 Proc. Rep. 172, 10 N. Y. Supp. 939; N. Y. 644, 31 N. Y. S. R. 906, 24 N. Y. Civ. Proc. Rep. 398, E. 1021; *Kiernan v. Agricultural Ins. Co.* 3 App. Div. 26, 74 N. Y. S. R. 885, 41 N. Y. Supp. 493; *Walker v. Chilson*, 65 Hun, 529, R. 417, 37 N. Y. Supp. 1070, 20 N. Y. Supp. 527; *McFarren v. St. John*, 14 Hun, 387.

²*Stevens v. Veriane*, 2 Lans. 90. ³*Smith v. Kerr*, 49 Hun, 29, 15 N. Y. Civ. Proc. Rep. 126, 28 N. Y. Week. Dig. 516, 17 N. Y. S. R. 351, 1 N. Y. Supp. 454; *McFarren v. St. John*, 14 Hun, 387; *Riggs v. Waydell*, 17 Hun, 515, Affirmed in 78 N. Y. 586; *Leslie v. Walrath*, 45 Hun, 18, 26 N. Y. Week. Dig. 450, 9 N. Y. S. R. 652.

⁴*Warner v. Babcock*, 9 App. Div. 398, 75 N. Y. S. R. 885, 41 N. Y. Supp. 493; *Sares v. Matthews*, 39 N. Y. S. R. 920, 15 N. Y. Supp. 510.

⁵*Perine v. Wiggins*, 18 N. Y. Civ. Proc. Rep. 293.

⁶*Smith v. Kerr*, 49 Hun, 29, 15 N. Y. Civ. Proc. Rep. 126, 28 N. Y. Week. Dig. 516, 17 N. Y. S. R. 351, 1 N. Y. Supp. 454.

⁷*Noonan v. Smith*, 12 Abb. N. C. 337, Affirmed in 84 N. Y. 672, without opinion.

irregularity which is waived by a failure to return the copy with the objections specifically pointed out.⁹ It is not essential that the paper have the original signature of the attorney who subscribed it. His name may be either written by himself, or by someone else, or even printed, as long as the signature is treated by the attorney as his.¹⁰

Upon the taxation of costs the defendant must produce the original, or else account for its absence. The fact that the office of the defendant's attorney, with all its contents, has been destroyed by fire, since the service of the offer, is a sufficient excuse.¹¹

198. How affected by the amendment of the complaint.—An offer of judgment is rendered ineffectual for any purpose, by an amendment of the complaint, which leaves out some of the causes of action contained in the original complaint.¹² If the amendment is one of form only, the offer will still hold good.¹³ The offer must apply to the state of the pleadings at the time it is made.¹⁴ Where the plaintiff is allowed to amend a complaint on the trial, increasing his claim for interest, the defendant must be allowed to amend his offer to meet the change in the complaint, or the court may, as a condition of granting the amendment, make the excess of interest of no avail to defeat the offer.¹⁵

⁹*Markes v. Epstein*, 13 N. Y. Civ. Proc. Rep. 293. *Schmenger*, 12 N. Y. Civ. Proc. Rep. 312, 9 N. Y. S. R. 516.

¹⁰*Smith v. Kerr*, 49 Hun, 29, 15 N. Y. Civ. Proc. Rep. 126, 28 N. Y. Week. Dig. 516, 17 N. Y. S. R. 351, 1 N. Y. Supp. 454; *Barnard v. Heydrick*, 49 Barb. 62, 32 How. Pr. 97, 2 Abb. Pr. N. S. 47; *New York v. Eisler*, 2 N. Y. Civ. Proc. Rep. 125. ¹³*Woelfle v. Schmenger*, 12 N. Y. Civ. Proc. Rep. 312, 9 N. Y. S. R. 516; *Kills v. Seeber*, 10 How. Pr. 270.

¹⁴*Woelfle v. Schmenger*, 12 N. Y. Civ. Proc. Rep. 312, 9 N. Y. S. R. 516; *Tompkins v. Ives*, 36 N. Y. 75, 3 Abb. Pr. N. S. 267, Affirming 30 How. Pr. 13; *Kautz v. Vandenburg*, 77 Hun, 591, 60 N. Y. S. R. 496, 28 N. Y. Supp. 1046.

¹²*Thornall v. Crawford*, 34 Misc. 714, 70 N. Y. Supp. 61; *Woelfle v. Brooks v. Mortimer*, 10 App. Div. 518, 42 N. Y. Supp. 299.

199. When offer is definite.— An offer of judgment is definite enough where it offers to allow judgment to be taken against the defendant for the amount of the note sued on, less two other notes, with costs and disbursements. The amount for which the offer was made can be ascertained by the clerk by computation.¹⁶

200. How many offers may be made.— A defendant may serve as many offers as he desires, and for such different amounts as he pleases.¹⁷

201. Offers in justice's court.— An offer made in an action in justice's court is good in an action in the supreme court which is commenced there for the same cause of action, after a plea of title has been interposed in the justice's court.¹⁸ An offer made in a justice's court refers to that court, and has nothing to do with the awarding of costs upon a new trial in the county court.¹⁹

is commenced there for the same cause of action, after a plea of judgment and answer, served together, may be deemed served together or at different times according to the intention of the parties.²⁰ The plaintiff has ten days after personal service of an offer of judgment, to decide whether he will accept it or not. If the case is reached and disposed of before the expiration of that time, the offer is of no effect.²¹ Even if the trial has com-

¹⁶*Burnett v. Westfall*, 15 How. Pr. 430; *Keese v. Wyman*, 8 How. Pr. 88.

¹⁷*Hibbard v. Randolph*, 72 Hun, 626, 56 N. Y. S. R. 431, 25 N. Y. Supp. 854.

¹⁸*Niagara Falls Suspension Bridge Co. v. Bachman*, 4 Laus. 523; *Cook v. Nellis*, 18 N. Y. 126; *Pugsley v. Kisselburgh*, 10 N. Y. 420, 7 How. Pr. 402; *Wiggins v. Tallmadge*, 7 How. Pr. 404; *Brown v. Brown*, 6 N. Y. 106, 6 How. Pr. 320.

¹⁹*Mock v. Saile*, 52 Hun, 198, 17 N. Y. Civ. Proc. Rep. 121, 23 N. Y. S. R. 307, 5 N. Y. Supp. 149.

²⁰*Kautz v. Vandenburgh*, 77 Hun, 591, 60 N. Y. S. R. 496, 28 N. Y. Supp. 1046; *Ruggles v. Fogg*, 7 How. Pr. 324; *Schneider v. Jacobi*, 1 Duer, 694, 695, 11 N. Y. Legal Obs. 220, Approved in *Tompkins v. Ives*, 36 N. Y. 75, 3 Abb. Pr. N. S. 267-269.

²¹*Sares v. Matthews*, 39 N. Y. S. R. 920, 15 N. Y. Supp. 510; *Herman v. Lyons*, 10 Hun, 111, 2 Abb. N. C. 90; *Pomeroy v. Hulin*, 7 How. Pr. 161; *Walker v. Johnson*, 8 How. Pr. 240; *Hawley v. Davis*, 5 Hun, 642; *Perine v. Wiggins*, 18 N. Y. Civ. Proc. Rep. 172, 10 N. Y. Supp. 939.

menced before the expiration of that time, but is not disposed of until after the expiration of that time, the offer is a nullity. A trial before a referee is commenced when the parties appear before him for trial, and, before the taking of any testimony, permission is granted to one of the parties to amend his pleadings, and the trial is adjourned.²²

203. Service by mail.—Where an offer is served by mail the plaintiff has twenty days within which to accept the offer.²³

204. Power of the defendant to withdraw his offer.—The defendant cannot withdraw his offer until the end of the period which is given by law to the plaintiff for the consideration of the offer.²⁴

205. Amendment of offer of judgment.—In case of a mistake the court may allow the defendant to amend his offer of judgment.²⁵ The defendant cannot move the case until the time given by law to the plaintiff for the consideration of the offer has expired.²⁶

The New York city court at general term has held that, where the plaintiff goes to trial before the expiration of the ten days, and recovers the amount of the offer, he cannot then accept the offer of judgment, and the defendant is entitled to costs from the time of his offer.²⁷

206. Computation of interest in the offer of judgment.—An offer of judgment for a certain amount, "with interest," but having no date from which the interest can be computed, will be

²²*Warner v. Babcock*, 9 App. Div. 393, 75 N. Y. S. R. 885, 41 N. Y. Supp. 493.

²³*Van Allen v. Glass*, 60 Hun, 546, 21 N. Y. Civ. Proc. Rep. 127, 39 N. Y. S. R. 676, 15 N. Y. Supp. 261; *Sares v. Matthews*, 39 N. Y. S. R. 920, 15 N. Y. Supp. 510.

²⁴*McVicar v. Keating*, 19 App. Div. 581, 46 N. Y. Supp. 298; *Hackett v. Edwards*, 22 Misc. 659, 49 N. Y. Supp. 609; *Walker v. Johnson*, 8 How. Pr. 240.

²⁵*Eagan v. Moore*, 2 N. Y. Civ. Proc. Rep. (Browne) 300, 11 Daly, 199, 2 N. Y. Civ. Proc. Rep. (McCarthy) 336; *McVicar v. Keating*, 19 App. Div. 581, 46 N. Y. Supp. 298. ²⁶*Walker v. Johnson*, 8 How. Pr. 240.

²⁷*Gutbroff v. Wallach*, 3 Misc. 136, 51 N. Y. S. R. 495, 22 N. Y. Supp. 745.

treated as though no offer of interest was made. To ascertain whether such offer is more favorable than the recovery, it will be compared with the entire recovery, including interest to the date of the offer, but excluding interest after that date, because judgment could be entered on the day that the offer was served.²⁸ Where damages are liquidated and the cause of action draws interest, and the offer does not contain a provision for interest from any date, interest will be computed on the amount of the offer from its date to the date of the judgment, in ascertaining whether the offer is more favorable than the recovery.²⁹ Or the rule may be stated in another way. Interest which accrued subsequent to the offer of judgment cannot be estimated in determining whether a judgment is more or less favorable than the offer.³⁰

But when the claim is unliquidated, interest cannot be recovered thereon, and therefore interest cannot be added to the sum offered, for the purpose of determining whether the judgment obtained is more favorable than that offer.³¹

207. Offer must allow entry of judgment for costs.—An offer “with costs to date” is a valid offer; the words “to date” are mere surplusage. The plaintiff could enter judgment on the date of the offer.³²

The cases which held that adding the words “to date” after the words “with costs” invalidated an offer are overruled by the last case cited.³³

²⁸*Smith v. Bowers*, 3 N. Y. Civ. Proc. Rep. 72, 15 N. Y. Week. Dig. 485. ³⁰*Pike v. Johnson*, 47 N. Y. 1; *Kelly v. Bonesteel*, 29 Hun, 546.

²⁹*Thornall v. Crawford*, 34 Misc. 714, 70 N. Y. Supp. 61; *Bathgate v. Haskin*, 63 N. Y. 261; *Johnston v. Jackson*, 26 How. Pr. 398; *Pike v. Catlin*, 57 N. Y. 652.

Johnson, 47 N. Y. 1; *Smith v. Bowers*, 3 N. Y. Civ. Proc. Rep. 72, 15 N. Y. Week. Dig. 485; *Hirschspring v. Boc*, 20 Abb. N. C. 402, 13 N. Y. Civ. Proc. Rep. 125; *Tilman v. Kcane*, 1 Abb. Pr. N. S. 23.

³²*Lynk v. Weaver*, 128 N. Y. 171, 28 N. E. 508. ³³*Henderson v. Bannister*, 1 N. Y. City Ct. Rep. 125; *Ranney v. Russell*, 3 Duer, 689.

208. When the plaintiff is entitled to the costs of the action.—

The plaintiff is entitled to costs where he recovers any amount in excess of the offer of judgment. It makes no difference that the defendant has been compelled, as a condition of being granted a favor, to allow the plaintiff to enter the judgment for the amount of the offer, the costs to be determined by the verdict on the amount in dispute. In such a case the plaintiff, when he recovers less than \$50 upon the trial, is entitled to full costs, provided that the entire amount recovered in both judgments exceeds \$50.³⁴ The plaintiff is entitled to costs up to the time of the offer of judgment, although he fails to obtain a more favorable judgment than the offer.³⁵ The defendant is entitled to costs subsequent to the offer, when the recovery is not greater than the offer.

209. Offer of judgment by joint debtors.—Section 738 of the Code of Civil Procedure allows an offer of judgment to be made by one of two or more defendants, when the action can be severed. Therefore, if two or more defendants are sued upon a joint liability, an offer by one of the defendants to allow judgment to be taken against him is not as favorable as a judgment for a smaller amount, because such a judgment could be enforced only against the joint property of all the defendants and the individual property of the defendant making the offer.³⁶ The implied agency resulting from a partnership does not extend to making an offer of judgment, so as to bind the individual property of the other partners,³⁷ unless he had a special authority to

³⁴*Hoe v. Sanborn*, 36 N. Y. 93, 3 How. Pr. N. S. 82, 2 N. Y. City Ct. Abb. Pr. N. S. 189, 35 How. Pr. 197. Rep. 172, 7 N. Y. Civ. Proc. Rep.

³⁵*Magnin v. Dinsmore*, 46 How. Pr. 428; *Emery v. Emery*, 9 How. Pr. 297, 15 Abb. Pr. N. S. 331; *Hirschspring v. Boc*, 20 Abb. N. C. 402, 13 N. Y. Civ. Proc. Rep. 125; *Burnett v. Westfall*, 15 How. Pr. 430. Code Rep. N. S. 161, note.

³⁶*Bannerman v. Quackenbush*, 13 N. Y. Civ. Proc. Rep. 205, 10 N. Y. Supp. 915; *Daly*, 460, 17 Abb. N. C. 103, 9 N. Y. Civ. Proc. Rep. 108, Affirming 271; *Weed v. Bergstresser*, 2 Month.

³⁷*Rich v. Roberts*, 18 N. Y. Civ. Proc. Rep. 205, 10 N. Y. Supp. 915;

Garrison v. Garrison, 67 How. Pr.

271; *Weed v. Bergstresser*, 2 Month.

make an offer.³⁸ But where one of the defendants is in default and the other defendant makes an offer of judgment, the offer is good, and the plaintiff must recover a sum larger than the offer, or he will be compelled to pay costs.³⁹

210. Effect of offer upon counterclaims.—An offer of judgment applies to the pleadings as they are at the time of the offer, and not as they may afterwards become.⁴⁰ The acceptance of an offer will bar a future action upon any claim set out in the complaint, or any counterclaim arising out of the same transaction that would be barred by an entry of judgment upon the causes of action set out in the complaint.⁴¹ It will not bar an independent counterclaim that is set up in an answer served after the offer of judgment.⁴²

It will bar all claims set up in the complaint,⁴³ and all counterclaims set up in the answer, when the offer is served after the service of the answer.⁴⁴

In ascertaining whether a recovery is more favorable than the offer served before the answer, the amount of counterclaims so independent of the cause of action set out in the complaint that an action thereon would not be barred by the entry of a judgment upon default must be added to the recovery obtained by the plaintiff.⁴⁵ A defendant who makes an offer of judgment which is not accepted, and then sets up a counterclaim arising out of the same transaction as the cause of action, is entitled to

L. Bull. 55; *Binney v. Le Gal*, 19 Barb. 592, 1 Abb. Pr. 283; *Heckemann v. Young*, 55 Hun. 406, 29 N. Y. S. R. 55, 8 N. Y. Supp. 111; *Everson v. Gehrman*, 1 Abb. Pr. 167; *Emery v. Emery*, 9 How. Pr. 130.

³⁸*Bridenbecker v. Mason*, 16 How. Pr. 203.

³⁹*La Farge v. Chilson*, 3 Sandf. 752, 1 N. Y. Code Rep. N. S. 159.

⁴⁰*Tompkins v. Ives*, 36 N. Y. 75.

⁴¹*Dowd v. Smith*, 8 Misc. 619, 61 N. Y. S. R. 333, 29 N. Y. Supp. 821.

⁴²*Kautz v. Vandenburg*, 77 Hun, 591, 60 N. Y. S. R. 496, 28 N. Y. Supp. 1046; *Tompkins v. Ives*, 36 N. Y. 75; *Fielding v. Mills*, 2 Bosw. 489.

⁴³*Davies v. New York*, 93 N. Y. 250.

⁴⁴*Bathgate v. Haskin*, 63 N. Y. 261.

⁴⁵*Tompkins v. Ives*, 36 N. Y. 75; *Fielding v. Mills*, 2 Bosw. 489; *Rugles v. Fogg*, 7 How. Pr. 324; *Schneider v. Jacobi*, 1 Duer, 694, 11 N. Y. Legal Obs. 220.

costs when the recovery is not for a sum larger than the offer.⁴⁶ In determining where costs shall fall, it is proper to add to the recovery obtained by the plaintiff, all the counterclaims that he has extinguished, which would not have been barred had he accepted the offer. The extinguishment of counterclaims that would have been barred by the acceptance of the offer must be disregarded for any purpose.⁴⁷

211. When the defendant is entitled to costs.—The defendant is entitled to all his costs and disbursements after the service of an offer of judgment which is not accepted, where the plaintiff does not recover a judgment more favorable than the offer, the plaintiff being entitled to costs and disbursements up to the time of the offer.⁴⁸

The plaintiff is entitled to costs where the defendant makes an offer of judgment which is not accepted, in an action upon two causes of action, where the plaintiff recovers on one cause of action the exact amount of the offer, and 6 cents is allowed him on the other.⁴⁹ Where a third party, who had an interest in the subject-matter, was brought in at the request of the defendant, who then made the plaintiff an offer of judgment, the amount of costs to which the third party was entitled at the time of the offer cannot be added to the recovery, in ascertaining whether the recovery was more favorable than the offer. His costs have nothing to do with the offer.⁵⁰

212. Judgment entered, where plaintiff obtains a recovery and defendant is entitled to costs.—Only one judgment should be entered when the defendant is entitled to costs after his offer of judgment, which is not accepted. The amount of his costs

⁴⁶*Seorille v. Kent*, 8 Abb. Pr. N. S. 17.

⁴⁷*Schneider v. Jacobi*, 1 Duer, 694, 11 N. Y. Legal Obs. 220; *Ruggles v. Fogg*, 7 How. Pr. 324.

⁴⁸*Magain v. Dinsmore*, 46 How. Pr. 297, 15 Abb. Pr. N. S. 331; *Burnett v. Westfall*, 15 How. Pr. 430.

⁴⁹*Dayton v. Parke*, 67 Hun, 137, 51 N. Y. S. R. 542, 22 N. Y. Supp. 613.

⁵⁰*Singleton v. Home Ins. Co.* 121 N. Y. 644, 31 N. Y. S. R. 906, 24 N. E. 1021.

should be deducted from the sum of the recovery and the costs up to the time of the offer, and a judgment for the balance should be entered.⁵¹ The attorney for the defendant cannot object to the absorption of the defendant's costs in the judgment, because the costs are due primarily from the plaintiff to the defendant, and the attorney's right is only derivative.⁵² See § 17, *ante*.

213. Effect of the appellate court modifying the judgment, so that defendant is entitled to costs.— Where the appellate court reduces the recovery so that it is less than the offer, the defendant is entitled to costs subsequent to the offer the same as though judgment had been rendered for that amount in the first instance.⁵³ If the offer is not contained in the appeal papers the appellate court cannot amend its remittitur so as to give the defendant costs. The special term has power to give the defendant the benefit of his offer.⁵⁴

214. To what costs plaintiff is entitled upon accepting an offer of judgment.— The plaintiff is entitled, upon accepting an offer of judgment, to only those costs and disbursements which he had incurred at the time the offer was served, or that may be necessary to incur to enter up the judgment. He cannot tax costs and disbursements for proceedings regularly had in the prosecution of the action, incurred after the receipt of the offer and before its acceptance.⁵⁵

215. Additional allowance.— When the recovery is less than the offer of judgment, the defendant is entitled, not only to the

⁵¹*Coatsworth v. Ray*, 28 N. Y. Civ. R. Co. 62 N. Y. 290, 1 N. Y. Week. Proc. Rep. 6, 52 N. Y. Supp. 498; Dig. 38.

Johnson v. Farrell, 10 Abb. Pr. 384; ⁵²*Douglass v. Macdurm*, 2 How. Southard v. Becker, 15 Misc. 436, 37 Pr. N. S. 289; *Henderson v. Bannis-* N. Y. Supp. 927; *Runnell v. Griffin*, 1 N. Y. City Ct. Rep. 125; 8 Abb. Pr. 39; *Dingee v. Shcars*, 29 Walker v. Johnson, 8 How. Pr. 240; Hun, 210; *Warden v. Frost*, 35 Hun, Hawley v. Davis, 5 Hun, 642; *Van Allen v. Glass*, 60 Hun, 546, 21 N. Y.

141. *Bulkley v. Back*, 22 Jones & S. Civ. Proc. Rep. 127, 39 N. Y. S. R. 300. 676, 15 N. Y. Supp. 261; *Herman v.*

⁵³*Sturgis v. Spofford*, 58 N. Y. 103. Lyons, 10 Hun, 111; *Pomeroy v. Hu-*

⁵⁴*Lumbard v. Syracuse, B. & N. Y. lin*, 7 How. Pr. 161.

costs awarded by statute, but also to such other costs as may be awarded to him in the discretion of the court.⁵⁶ A plaintiff, however, is entitled upon the acceptance of an offer of judgment to only the statutory costs, and the court has no power to grant an extra allowance.⁵⁷

216. Costs upon the acceptance of an offer of judgment for less than \$50.— It was held under the old Code that where the plaintiff accepted an offer of judgment for less than \$50 the defendant was entitled to costs.⁵⁸ This case was later explained on the ground that the defendant claimed costs in the offer of judgment, and therefore he was entitled to them when his offer was accepted. This case also held that where the defendant made an offer of judgment, with costs, it meant such costs as the plaintiff was entitled to under the pleadings and offer, and therefore, where the offer was for a sum less than \$50 the plaintiff would be entitled to no costs; and the defendant was not entitled to costs, as he had waived his rights thereto by a stipulation that the plaintiff might have costs.⁵⁹ The proper interpretation of such an offer would be such costs to be entered in the judgment as the Code of Civil Procedure grants, and therefore the defendant would be entitled to costs.

217. Offer of judgment in actions upon bonds and mortgages.— An offer of judgment may be made in all actions.⁶⁰ One made in a mortgage foreclosure stands on the same ground as in any other action.⁶¹ The offer must include the right to enter up a

⁵⁶*Commissioners of Pilots v. Spofford*, 3 Hun. 57. 5 Thomp. & C. 353;

Brady v. Durbrow, 3 E. D. Smith,

78; *Landon v. Van Etten*, 57 Hun,

122, 19 N. Y. Civ. Proc. Rep. 78, 32

N. Y. S. R. 439, 10 N. Y. Supp. 802;

Hirschspring v. Boc, 20 Abb. N. C.

402, 13 N. Y. Civ. Proc. Rep. 125.

⁵⁷*Pool v. Osborn*, 8 N. Y. Civ. Proc.

Rep. 232, note; *Safety Steam Gener-*

ator Co. v. Dickson Mfg. Co. 61

Hun, 335, 21 N. Y. Civ. Proc. Rep.

329, 40 N. Y. S. R. 681, 16 N. Y.

Supp. 32.

⁵⁸*Johnson v. Sagar*, 10 How. Pr. 552.

⁵⁹*Moffett v. Deom*, 8 N. Y. Civ. Proc. Rep. 85.

⁶⁰*Lumbard v. Syracuse, B. & N. Y.*

R. Co. 62 N. Y. 290; *Singleton v.*

Home Ins. Co. 121 N. Y. 644, 31 N.

Y. S. R. 906, 24 N. E. 1021.

⁶¹*Bathgate v. Haskin*, 63 N. Y.

261; *Penfield v. James*, 56 N. Y. 659;

Astor v. Palache, 49 How. Pr. 231.

deficiency judgment.⁶² In an action at law upon a bond which is secured by a mortgage, for an instalment of interest, an offer of the whole sum secured by the bond and mortgage is not as favorable as a judgment for the instalment of interest, because it is more favorable to have an investment for the principal sum than to have to secure another investment.⁶³

218. Tender after the commencement of a mortgage foreclosure.

—A defendant in a mortgage foreclosure may make a tender, after suit is commenced, of the amount due, and such costs as the parties may agree upon. If no agreement can be reached the defendant should make an application to the court to settle the amount of the costs.⁶⁴

The defendant is not entitled to have his mortgage discharged of record after a sufficient tender, until the court has passed upon the question of plaintiff's costs.⁶⁵ The offer must contain an offer to allow a deficiency judgment, where there is a personal liability on the part of the defendant.

219. Offer of judgment in replevin.— An offer of judgment may be made in a replevin action.⁶⁶ The plaintiff cannot, upon an acceptance of an offer of judgment for specific property, to which no value is fixed, and of a certain sum as damages, tax costs in excess of the damages named in the offer, where the amount of damages is less than \$50.⁶⁷

220. Offer of judgment in an action to foreclose a mechanic's lien.— An offer of judgment may be made in an action to foreclose a mechanic's lien.⁶⁸ Earlier cases held that the offer must contain a statement that it is made in "discharge of the lien."⁶⁹

⁶²*Rollins v. Barnes*, 23 App. Div. 240, 5 N. Y. Anno. Cas. 153, 48 N. Y. Supp. 779; *Bettis v. Goodwill*, 32 How. Pr. 137.

⁶³*Howard v. Farley*, 3 Robt. 599.

⁶⁴*Pratt v. Ramsdell*, 16 How. Pr. 59, 7 Abb. Pr. 340, note.

⁶⁵*Reimer v. Diedrick*, 4 N. Y. Week. Dig. 230.

⁶⁶*Areher v. Cole*, 22 How. Pr. 411.

⁶⁷*Hausauer v. Machawicz*, 54 App. Div. 23, 66 N. Y. Supp. 340.

⁶⁸*Schulte v. Lestershire Boot & Shoe Co.* 88 Hun. 226, 68 N. Y. S. R. 258, 34 N. Y. Supp. 663; *Pfister v. Stumm*, 7 Misc. 526, 27 N. Y. Supp. 1000.

⁶⁹*Hall v. Dennerlein*, 39 N. Y. S.

Later cases have held that offers which did not contain these words were good.⁷⁰ An offer of judgment must contain an offer to allow a deficiency judgment to be entered against the defendant, where there is a personal liability on his part.⁷¹

An offer by an owner to allow the contractor to take judgment for a certain sum and costs, less the amount due the subcontractor on his lien, is not as favorable as a judgment for a smaller sum, out of which the subcontractor was to be paid, because by the judgment the debt of the contractor to the subcontractor is paid, but under the offer the lien of the contractor was to be discharged, and his debt to the subcontractor was still unpaid.⁷²

The serving of an offer of judgment in a mechanic's lien foreclosure or any other equity action does not deprive the court of its discretion as to costs. The offer only applies where costs are allowed. If the court shall decide upon the disposition of a case that no costs shall be allowed, the defendant has no right to the costs which are usually allowed.⁷³

221. Tender before suit brought. *a. When action is commenced.*—A tender on the day of signing the summons, but before its service, is a tender before suit brought.⁷⁴ This is so, although the summons has been delivered to the sheriff for service.⁷⁵

b. Tender to whom.—The tender must be made to the creditor or some person authorized to receive it on his behalf.⁷⁶ If the creditor absents himself for the purpose of avoiding his debtor the tender may be made to a person at his house.⁷⁷

R. 67, 14 N. Y. Supp. 796; *Burton v. Rockwell*, 63 Hun. 163, 44 N. Y. S. R. 487, 17 N. Y. Supp. 665.

⁷⁰*Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782.

⁷¹*Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782.

⁷²*Fargo v. Helmer*, 43 Hun. 17, 25 N. Y. Week. Dig. 405, 6 N. Y. S. R. 584.

⁷³*Conolly v. Hyams*, 42 App. Div. 63, 58 N. Y. Supp. 932.

⁷⁴*Kelly v. West*, 4 Jones & S. 304.

⁷⁵*Knight v. Beach*, 7 Abb. Pr. N. S. 241; *Brown v. Ferguson*, 2 Denio, 196; *Hull v. Peters*, 7 Barb. 331.

⁷⁶*Grussy v. Schneider*, 50 How. Pr. 134; *Hargous v. Lahens*, 3 Sandf. 213.

⁷⁷*Judd v. Ensign*, 6 Barb. 258; *Smith v. Smith*, 2 Hill, 351, 25 Wend. 405.

c. In what tender must consist.—The tender may be made with any kind of money or by check, unless the creditor objects to the kind of money or payment by check at the time the tender is made. By not objecting he waives any irregularity that could have been cured.⁷⁸ This is especially so where the creditor has requested a check and refuses one on other grounds.⁷⁹ The old rule used to be that the tender must be made in legal tender.⁸⁰ But the strictness of this rule has been modified by the necessities and usages of modern commercial life.

d. Waiver by the creditor of a formal tender.—When the debtor is able and willing to pay his debt, an actual tender may be waived by the creditor.⁸¹ A tender need not be made to one who states in advance that he will not receive the money.⁸² If the tender is rejected on a specified ground, no other objection which could be obviated can afterwards be raised.⁸³

e. Practice of the defendant to avail himself of the tender.—A tender before suit brought, to be of any avail, must be pleaded and the money paid into court before, or at the time of, the service of the answer.⁸⁴

The money need not be brought into court where the tender has only the effect of extinguishing a lien, and does not discharge

⁷⁸*Duffy v. O'Donovan*, 46 N. Y. 223; *Link v. Mack*, 25 Misc. 615, 56 N. Y. Supp. 115.

⁷⁹*Mitchell v. Vermont Copper Min. Co.*, 47 How. Pr. 218.

⁸⁰*Grussy v. Schneider*, 50 How. Pr. 134; *Block v. Garfield*, 30 Misc. 821, 61 N. Y. Supp. 918.

⁸¹*Link v. Mack*, 25 Misc. 615, 56 N. Y. Supp. 115; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Dana v. Fiedler*, 1 E. D. Smith, 463. Affirmed in 12 N. Y. 40, 62 Am. Dec. 130; *Lawrence v. Miller*, 13 N. Y. Week. Dig. 124.

⁸²*Cashman v. Martin*, 50 How. Pr. 337; *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286.

⁸³*Hull v. Peters*, 7 Barb. 331; *Car-*

man v. Pultz, 21 N. Y. 547; *Congregation Beth Elohim v. Central Presby. Church*, 10 Abb. Pr. N. S. 484;

Duffy v. O'Donovan, 46 N. Y. 223.

⁸⁴*Simpson v. French*, 25 How. Pr.

464; *Platner v. Lehman*, 26 Hun.

374; *Heywood Boot & Shoe Co. v.*

Ralph, 82 Hun. 418, 63 N. Y. S. R.

580, 31 N. Y. Supp. 263; *Wilson v.*

Doran, 110 N. Y. 101, 17 N. E. 688;

Cronin v. Epstein, 1 N. Y. Supp. 69,

Affirmed in 15 Daly, 5, 19 N. Y. S. R.

806, 2 N. Y. Supp. 769; *Becker v.*

Boon, 61 N. Y. 317; *Halpin v.*

Phoenix Ins. Co., 118 N. Y. 165, 23

N. E. 482; *Sheriden v. Smith*, 2 Hill.

538; *Brown v. Ferguson*, 2 Denio.

196.

the debt.⁸⁵ If the plea of tender is insufficient or irregular it may be disregarded.⁸⁶ If the defendant pleads tender, but does not pay the money into court, the answer may be returned as a nullity.⁸⁷ It is too late to pay the money into court on the day of trial.⁸⁸ The defendant must prove upon the trial both tender and payment into court.⁸⁹

If the plaintiff does not recover a judgment more favorable than the tender, he must pay costs.⁹⁰

The defendant must also serve notice on the plaintiff that he has paid the money into court. Whether the notice in the pleading is sufficient has not been definitely determined.⁹¹

Pleading the payment into court is probably sufficient.⁹²

f. Waiver of irregularities in pleading tender.—There is a lack of harmony in the decisions as to what acts are mere matters of practice the nonperformance of which, therefore, may be waived as irregularities, and what are absolutely required, and therefore cannot be waived.

It has been held that the payment of money into court, pleading that fact, and giving notice of such payment, other than that contained in the pleading, are mere matters of practice, and a failure to perform any of them is an irregularity which may be waived.⁹³

⁸⁵*Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *Kortright v. Cady*, 21 N. Y. 343.

⁸⁶*Sheridan v. Smith*, 2 Hill, 538; *Simpson v. French*, 25 How. Pr. 464; *Platner v. Lehman*, 26 Hun, 374.
⁸⁷*Simpson v. French*, 25 How. Pr. 464.

⁸⁸*Heywood Boot & Shoe Co. v. Ralph*, 82 Hun, 418, 63 N. Y. S. R. 580, 31 N. Y. Supp. 263; *Falkenberg v. Bash*, 33 Misc. 607, 9 N. Y. Anno. Cas. 132, 67 N. Y. Supp. 1111.

⁸⁹*Logue v. Gillick*, 1 E. D. Smith, 398.

⁹⁰*Logue v. Gillick*, 1 E. D. Smith, 398; *Archer v. Cole*, 22 How. Pr. 411.

⁹¹*Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688; *Sheriden v. Smith*, 2 Hill, 538.

⁹²*Becker v. Boon*, 61 N. Y. 317; *Platner v. Lehman*, 26 Hun, 374; *Simpson v. French*, 25 How. Pr. 464; *Mela v. Geis*, 3 N. Y. Civ. Proc. Rep. 152.

⁹³*Sheriden v. Smith*, 2 Hill, 538; *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688; *Platner v. Lehman*, 26 Hun, 374; *Knight v. Beach*, 7 Abb. Pr. N. S. 241; *Roosevelt v. New York & H. R. Co.* 45 Barb. 554, 30 How. Pr. 226.

This would seem to be the sensible rule and the one in harmony with the rest of our practice. The service of a pleading too late, or one that is unverified when it should be verified, and many other acts, are irregularities which may be waived. It would seem, therefore, that if the money is actually paid into court, and the plaintiff has proceeded with the action as though all the formal requirements had been fulfilled, he will not be allowed to retrace his steps and take an objection to the defendant's method of procedure which he should have taken promptly. Where the money has never been paid into court, of course the plea of tender must fail.⁹⁴

The plaintiff is entitled to judgment, although the tender was sufficient and was kept good. It only stops the running of interest and costs.⁹⁵ The defendant is entitled to have the question of tender determined, so as to fix the question of costs. The plaintiff cannot take the money out of court, and have the case dismissed without costs. Where he takes the money out of court, he should tender the defendant his costs to that time. If he does not do this, the defendant is entitled to costs up to the time that the case is finally disposed of.⁹⁶

If the defendant agreed to pay money at a certain time and place, and he is sued therefor without demand, he must allege that he was ready and willing to pay it at the time and place, plead tender, and pay the money into court to save himself from costs.

Merely alleging that he was ready and willing to pay will not be sufficient.⁹⁷

g. Restrictions imposed upon the tender.—A tender may always be restricted by such conditions as, by the terms of the con-

⁹⁴*Becker v. Boon*, 61 N. Y. 317; ⁹⁶*Mela v. Geis*, 3 N. Y. Civ. Proc. Railway Advertising Co. v. Posner, Rep. 152.

31 Misc. 783, 65 N. Y. Supp. 226; ⁹⁷*Locklin v. Moore*, 5 Lans. 307; *Eddy v. O'Hara*, 14 Wend. 221; *Sheriden v. Smith*, 2 Hill, 538; *Wilder v. Seelye*, 8 Barb. 408. *Roosevelt v. New York & H. R. Co.*

⁹⁶*Kelly v. West*, 4 Jones & S. 304. 45 Barb. 554; *Simpson v. French*, 25

tract, are conditions precedent, or simultaneous or proper to be performed by the party to whom the tender is made.⁹⁸ But a tender on the condition that it extinguishes a lien is bad.⁹⁹ A tender upon the condition of receiving a receipt in full is bad;¹⁰⁰ or upon condition that the creditor sign a satisfaction piece of a bond and mortgage.¹⁰¹

222. Tender after suit brought. *a. Statute.*—The statute governing such tenders is contained in §§ 731 and 732 of the Code of Civil Procedure, which are as follows: Sec. 731. "Where the complaint demands judgment for a sum of money only, and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation, or to recover damages for a casual or involuntary personal injury, or a like injury to property, the defendant or his attorney may, at any time before the trial, tender to the plaintiff or his attorney such a sum of money as he conceives to be sufficient to make amends for the injury, or to pay the plaintiff's demand, together with the costs of the action, to that time."

Sec. 732. "A tender, made as prescribed in the last section, does not avail the defendant unless the money is accepted or is paid into court, and notice thereof in writing served upon the plaintiff's attorney, before the trial and within ten days after the tender. If the plaintiff takes out the amount paid in, he accepts the tender."

These sections apply only to those courts mentioned in subd. 4 of § 3347 of the Code of Civil Procedure,—the supreme court, county court, and city court of the city of New York.¹⁰²

How. Pr. 464; *Caldwell v. Cassidy*, 8 Cow. 271.

⁹⁸*Cass v. Higgenbotam*, 100 N. Y. 248, 3 N. E. 189; *Wheelock v. Tanner*, 39 N. Y. 481.

⁹⁹*Noyes v. Wyckoff*, 114 N. Y. 204, 23 N. Y. S. R. 105, 21 N. E. 158.

¹⁰⁰*Wood v. Hitchcock*, 20 Wend. 47.

¹⁰¹*Roosevelt v. Bull's Head Bank*,

45 Barb. 579; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627.

¹⁰²Code Civ. Proc. § 3347, subdiv. 4; *Reimer v. Diedrick*, 4 N. Y. Week. Dig. 230; *Re Clark*, 40 N. Y. S. R. 12, 45 N. Y. Supp. 370; *Ellenstein v. Klee*, 12 Misc. 112, 66 N. Y. S. R. 695, 33 N. Y. Supp. 94.

A tender after suit brought, to be of any avail, must include interest upon the claim and costs to the time of the tender,¹⁰³ even in an action in equity.¹⁰⁴ In an action in the district court, where the defendant admits part of the claim and pays it into the court, the plaintiff, in any event, is entitled to a judgment for that amount and costs to the time of tender.¹⁰⁵

If a tender is made according to §§ 731-734 of the Code of Civil Procedure, no conditions can be imposed upon paying the money into court or taking it out, except those warranted by the statute.¹⁰⁶ Where a defendant makes a tender in an action after the judgment has been reversed, with costs to abide the event, the tender must include all the costs of the action, including the costs in the appellate court, because the tender, if accepted, would decide the action in favor of the plaintiff, and the costs would then belong to him.¹⁰⁷

b. Waiver of irregularity.—The statutory notice required by § 732 of the Code of Civil Procedure may be waived by the plaintiff going to trial, and not raising that objection.¹⁰⁸ But where an objection is taken on the trial, of the failure to give such notice, the statutory notice is not waived.¹⁰⁹

c. In mortgage foreclosure.—Sec. 1634. "Where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due and the plaintiff's costs."

Sec. 1635. "In a case specified in the last section, if, after a

¹⁰³*Bernstein v. Lery*, 34 Misc. 772, 68 N. Y. Supp. 833.

¹⁰⁷*Stover v. Chasse*, 9 Misc. 45, 59 N. Y. S. R. 671, 29 N. Y. Supp. 291.

¹⁰⁴*Eaton v. Wells*, 22 Hun, 123.

¹⁰⁵*Taylor v. Brooklyn Elev. R. Co.*

¹⁰⁶*Ferree v. Ellsworth*, 47 N. Y. S. R. 119, 19 N. Y. Supp. 659.

18 N. Y. Civ. Proc. Rep. 72, 27 N. Y. S. R. 447, 7 N. Y. Supp. 625.

¹⁰⁸*Beil v. Supreme Council A. L. of H.* 42 App. Div. 168, 29 N. Y. Civ. Proc. Rep. 332, 58 N. Y. Supp. 1049.

¹⁰⁹*Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688.

final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but upon a subsequent default in the payment of principal or interest the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due."

223. Payment after the commencement of an action.—A defendant who, after the commencement of an action, makes a payment to the creditor personally, may set up the fact of such payment in his answer. Costs will be determined in such a case by the amount due at the time of the trial,¹¹⁰ unless the plaintiff's right to costs has been expressly reserved by agreement.¹¹¹

A plea of payment, which is sought to be upheld by proof of payment to a third person, without the knowledge or consent of the plaintiff, will not be substantiated by such proof.¹¹² A plaintiff is not bound by a payment to a clerk after an action has been commenced, unless he retains the money. The defendant's plea of payment when the plaintiff retains the money will be proper, and he will be entitled to costs.¹¹³ Where the defendant makes a payment to a clerk, without the costs, the plaintiff is entitled to the costs of the action, because the payment was unauthorized, unless he retains the money.¹¹⁴

224. Offer to liquidate damages conditionally.—Sec. 736. "In an action to recover damages for breach of a contract, the

¹¹⁰*Bronner Brick Co. v. M. M. Childs*, 28 Hun, 303; *Eaton v. Wells*, *Canda Co.* 18 Misc. 681, 42 N. Y. 82 N. Y. 576, 579; *Burke v. Phillips*, 20 Misc. 413, 26 N. Y. Civ. Proc. Supp. 14.

¹¹¹*Bronner Brick Co. v. M. M. Childs*, 28 Hun, 303; *Eaton v. Wells*, *Canda Co.* 18 Misc. 681, 42 N. Y. 82 N. Y. 576, 579; *Burke v. Phillips*, 20 Misc. 413, 26 N. Y. Civ. Proc. Supp. 14; *Watson v. Depeyster*, 1 Cal. 66; *Johnson v. Brannan*, 5 Johns. 268; *Stewart v. Elice*, 2

¹¹²*Moffatt v. Henderson*, 16 Jones & S. 449.

¹¹³*Keeler v. Van Wie*, 49 How. Pr. 97.

¹¹⁴*Bogardus v. Richtmeyer*, 3 Abb. Barb. 395; *Bendit v. Annesley*, 42 Barb. 192, 27 How. Pr. 184; *Keeler v. Van Wie*, 49 How. Pr. 97; *Rice v.* Pr. 253.

defendant's attorney may, with the answer, serve upon the plaintiff's attorney a written offer that if the defendant fails in his defense the damages may be assessed at a specified sum. If the plaintiff serves notice that he accepts the offer, with or before the notice of trial, and damages are awarded to him on the trial, they must be assessed accordingly."

Sec. 737. "If the plaintiff does not accept the offer, he cannot prove it upon the trial. But if the damages awarded to him do not exceed the sum offered, the defendant is entitled to recover the expenses necessarily incurred by him in preparing for the trial of the question of damages. The expenses must be ascertained and the amount thereof determined by the judge or the referee by or before whom the cause is tried."

224a. Judgment by confession.— Upon the entry of a judgment by confession the creditor is entitled to tax \$15 costs, besides the disbursements taxable in an action.¹¹⁵

¹¹⁵Code Civ. Proc § 1275.

CHAPTER XX.

COSTS ON APPEAL FROM A JUSTICE'S COURT.

- 225. Costs to perfect the appeal.
- 226. Where a new trial is not had in the appellate court.
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- 231. Costs on bastardy proceedings in the county court.
- 232. Special provisions relating to the municipal court of New York city.
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 - b. Appeals.
 - c. Opening defaults.
 - d. Costs upon the reversal of the judgment.
 - e. Costs upon the affirmance of the judgment.
 - f. Costs when the judgment is modified or a new trial is ordered.

225. Costs to perfect the appeal.—To render an appeal to the county court effectual the appellant must pay the costs of the justice's court and the charge of two dollars for making the return as provided by § 3047 of the Code of Civil Procedure.¹

Upon good cause shown, the county court may, in its discretion, allow these fees to be paid *nunc pro tunc*.² The discretion of the county court in refusing or granting such a favor cannot be reviewed by the appellate division, because the appellate division has not the power to review the discretionary order of a different court, unless it appears that that court has exercised its

¹*Griswold v. Van Deusen* 2 E. D. *Hays*, 40 App. Div. 557. 58 N. Y. Smith, 178; *Thomas v. Thomas*, 18 Supp. 35. Hum. 481; *Kenney v. Livery Stable* ²*Black v. Maitland*, 1 App. Div. 6, *Keepers' Assn.* 89 Hum. 190, 69 N. Y. 71 N. Y. S. R. 669, 36 N. Y. Supp. S. R. 237, 35 N. Y. Supp. 8; *Goss v.* 739; Code Civ. Proc. § 3049.

discretion arbitrarily.³ The appellant must also pay the additional costs allowed by § 3129 of the Code of Civil Procedure upon his appeal from a judgment of the justice's court of the city of Brooklyn⁴ or the city of Albany,⁵ or the additional costs allowed by any city court which has the same methods of appeal as justice's courts.

But no costs and disbursements such as stenographer's fees can be incurred and taxed without the express warrant of law.⁶ The costs of respondent which the appellant pays to take the appeal, belong to the respondent and must be paid to him. The appellant's only remedy, if he thereafter becomes entitled to them, is to include them in his judgment under § 3060 of the Code of Civil Procedure.⁷ He cannot maintain an action against respondent for them.⁸ Where costs are awarded to the appellant, he may include in his disbursements the costs and fees paid to the justice upon taking the appeal; and where the judgment rendered by the justice was against him, he may also include in those disbursements the costs of the action before the justice which he would have been entitled to recover in the judgment of the justice if that judgment had been in his favor.⁹

226. Where a new trial is not had in the appellate court.

a. Statute.—The question of costs upon the decision of an appeal, where a new trial is not had, is regulated by §§ 3066 and 3067 of the Code of Civil Procedure, which are as follows:

Sec. 3066. "Upon an appeal, provided for in this article the award of costs is regulated as follows:

³*Goss v. Hays*, 40 App. Div. 557. ⁷*Sherwood v. Travelers Ins. Co.* 12 58 N. Y. Supp. 35. Daly, 137. 65 How. Pr. 193, 3 N. Y.

⁴*Kenney v. Livery Stable Keepers' Asso.* 89 Hun, 190, 69 N. Y. S. R. 237, 35 N. Y. Supp. 8. ⁸*Kenney v. Livery Stable Keepers' Asso.* 89 Hun, 190, 69 N. Y. S. R. 237, 35 N. Y.

⁵*Sherwood v. Travelers Ins. Co.* 12 Supp. 8. ⁹*Bradley Salt Co. v. Meinhold*, 23 49 N. Y. S. R. 537, 22 N. Y. Supp. Misc. 468. 52 N. Y. Supp. 679.

⁶*Cohen v. Weill*, 32 Misc. 198, 65 N. Y. Supp. 695. ³Code Civ. Proc. § 3060; *Jacks v. Darrin*, 1 Abb. Pr. 232.

"I. If the appeal is dismissed because neither party brings it to a hearing, as prescribed in this article, costs shall not be awarded to either party.

"II. If the judgment is reversed for an error in fact, not affecting the merits, or if a new trial is directed, before the same or another justice, as prescribed in this article, the costs of the appeal are in the discretion of the appellate court.

"III. If the judgment is affirmed, costs must be awarded to the respondent.

"IV. If the judgment is reversed, costs must be awarded to the appellant.

"V. If the judgment is affirmed only in part, the costs, or such a part thereof as to the appellate court seems just, not exceeding \$10 besides disbursements, may be awarded to either party."

Sec. 3067. "Upon an appeal, provided for in this article, costs, when awarded, must be as follows, besides disbursements:

"To the appellant, upon reversal, \$30.

"To the respondent, upon affirmance, \$25."

Costs are in the discretion of the appellate court, only when the judgment is reversed for an error in fact, not affecting the merits,¹⁰ or a new trial is directed,¹¹ or the judgment is affirmed in part,¹² in which case costs in the appellate court are in the discretion of the court, not exceeding \$10 and disbursements and costs below.¹³

Upon the reversal the appellant is entitled, as of course, to \$30 costs.¹⁴ Upon an appeal in summary proceedings, costs are the

¹⁰*Mouroe v. White*, 25 App. Div. 292, 49 N. Y. Supp. 517.

¹¹Code Civ. Proc. § 3066, subd. 2.

¹²*Compton v. Long Island R. Co.* 1 N. Y. S. R. 554.

¹³Code Civ. Proc. § 3066, subd. 5; *German-American Bank v. Milliman*, 31 Misc. 87, 65 N. Y. Supp. 242.

¹⁴Code Civ. Proc. § 3066, subd. 4; Code Civ. Proc. § 3067; *Hahn v.*

Van Doren, 1 E. D. Smith, 411; *Main v. Eagle*, 1 E. D. Smith, 619; *Chapin v. Churchill*, 12 How. Pr. 367; *Snyder v. Goodrich*, 2 E. D. Smith, 84; *Wood v. Brown*, 6 Daly, 428; *Harding v. Ellston*, 19 N. Y. Civ. Proc. Rep. 252, 13 N. Y. Supp. 550; *Eisler v. Union Transfer & Storage Co.* 16 Daly, 456, 12 N. Y. Supp. 732.

same as upon an appeal from a judgment.¹⁵ Upon affirmance of a judgment the respondent is entitled to \$25 besides disbursements.¹⁶ The judgment will be affirmed with costs if the return does not show what judgment, if any, has been rendered.¹⁷

Upon a reversal or affirmance the appellate court has no power to relieve the defeated party from costs.¹⁸

b. Where there is no respondent.—Where plaintiff appeals from a judgment dismissing his complaint, where there is no appearance in the lower court or on the appeal, no costs can be awarded whether the judgment is affirmed or reversed.¹⁹

c. Where both parties appeal.—Where both parties appeal and the judgment is affirmed, costs must be awarded to each, but the order must provide that they offset each other.²⁰

227. Where a new trial is had in the appellate court.—When costs are awarded the successful party is entitled to tax, besides the disbursements, the following costs:

For all proceedings before notice of trial, \$15.

For all subsequent proceedings before trial, \$10.

For the trial of an issue of law, \$15.

For the trial of an issue of fact, \$20.

For the argument of a motion for a new trial on a case, \$15.

For each term not more than five, at which the appeal is regularly on the calendar, excluding the term at which it is tried or otherwise disposed of, \$10.²¹

The amount of disbursements are the same, as where no trial is had in the appellate court. See § 225, last part.

An offer to compromise after the action is deemed at issue is

¹⁵ Code Civ. Proc. § 2260; *Harrison v. Stuart*, 34 Hun, 259.

¹⁶ Code Civ. Proc. § 3066, subd. 3, and § 3067.

¹⁷ *Woodside v. Pender*, 2 E. D. Smith, 390.

¹⁸ *Logue v. Gillick*, 1 E. D. Smith, 398; *Compton v. Long Island R. Co.* 1 N. Y. S. R. 554.

¹⁹ *Katz v. Diamond*, 16 Misc. 577, 74 N. Y. S. R. 174, 38 N. Y. Supp.

²⁰ *Martin v. Tarbox*, 23 Misc. 761, 51 N. Y. Supp. 319.

²¹ Code Civ. Proc. § 3073.

provided for by § 3072 of the Code of Civil Procedure. This offer may be made by either party, and may be with or without costs. If the offer is not accepted and the party to whom it is made fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time. Where the offer of judgment is made after a verdict is set aside by the county court and a new trial ordered, but before the new trial, only one item for proceedings before notice of trial, and one item for all subsequent proceedings before trial, can be taxed by the party accepting the offer.²²

228. Offer to compromise before the return.— Section 3070 of the Code of Civil Procedure has been amended several times, and takes the place of a part of § 371 of the Code of Procedure. Many cases have been rendered obsolete by these amendments, and the practitioner should examine very closely cases decided before 1895, when the present law went into effect. The history of the legislation on this point is reviewed by Judge Vann in *Pierano v. Merritt*, 148 N. Y. 289, 42 N. E. 718.

The offer may be made by the party in person, or by his attorneys.²³ Where neither party makes an offer of judgment, the party who recovers judgment is entitled to costs. It makes no difference how small the recovery is,²⁴ or if it is simply a verdict of no cause of action, thus reversing an affirmative judgment in favor of the plaintiff.²⁵

If only one party makes an offer, which is not accepted, and the recovery is more favorable to the opposite party than the offer, neither party is entitled to costs, the defeated party because the recovery is larger than the offer, the successful party

²²*Whceler v. Mowers*, 16 Misc. 331, 39 N. Y. Supp. 731.

²³*Sherman v. Shisler*, 6 Misc. 203, 27 N. Y. Supp. 215.

²⁴*Pierano v. Merritt*, 148 N. Y. 293, 42 N. E. 718; *Munson v. Curtis*, 43 Hun. 214; *Goodenough v. Billings*, 21 N. Y. Week. Dig. 405.

²⁵*Clark v. Maltzacher*, 20 App. Div. 301, 46 N. Y. Supp. 1081. In *Effect Overruling Church v. Miller*, 46 How. Pr. 525; *Vanderwerken v. Brown*, 38 Hun. 234.

because he did not make an offer.²⁶ There are cases which hold that if the defendant makes an offer which is not accepted, and the plaintiff makes no offer, and the recovery is less favorable to the defendant than the offer, costs will be awarded under § 3228 of the Code of Civil Procedure, to the plaintiff if he recovers more than \$50.²⁷ Or if the complaint is dismissed or the recovery is less than \$50, costs will be awarded to the defendant.²⁸ The last clause is in direct contradiction to *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650, but the judge who wrote the opinion in *Brazee v. Hornby*, 27 Misc. 129, 29 N. Y. Civ. Proc. Rep. 296, 58 N. Y. Supp. 387, thought that the attention of the court of appeals had not been directed to § 3229 of the Code of Civil Procedure. All these cases last cited are based upon an *obiter* remark in *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650, and a reference thereto in *Pierano v. Merritt*, 148 N. Y. 289, 42 N. E. 718. It would seem that the only satisfactory solution of this question is to take the remark in *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650, for just what it is,—an *obiter* remark. If § 3228 applies to this class of cases, it would seem that § 3229 must also apply, and the court decided in *McKuskie v. Hendrickson*, *supra*, that § 3229 did not apply, because if it did apply the defendant would have been allowed costs, as the recovery was less than \$50. It would seem that the only logical conclusion must be that neither § 3228 nor § 3229 applies to this class of cases, but that the costs are governed exclusively by §§ 3060, 3070, 3072 and 3073 of the Code of Civil Procedure. If §§ 3228 and 3229 do apply to these actions, then, under the provisions of subd. 13 of § 3347, those sections (3228, 3229) must be applicable to actions on

²⁶*McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650; *Keyes*, 66 Hun. 233, 49 N. Y. S. R. Y. 555, 28 N. E. 650; *Sherman v.* 299, 21 N. Y. Supp. 87.

Shisler, 6 Misc. 203, 27 N. Y. Supp. ²⁷*Brazee v. Hornby*, 27 Misc. 129, 215; *Zoller v. Smith*, 45 Hun. 319, 29 N. Y. Civ. Proc. Rep. 296, 58 N. Y. S. R. 438. Y. Supp. 387; *Quick v. Wilson*, 27

²⁸*Fowler v. Dearing*, 6 App. Div. Hum. 592; *Porter v. Cobb*, 25 Hun. 221, 39 N. Y. Supp. 1034; *Birdsall* 184.

appeal from a justice's court. This would carry the right to additional allowances, security for costs, etc.

Upon the acceptance of an offer of judgment made under § 3070 of the Code of Civil Procedure, no costs can be taxed, other than disbursements, including those in the court below.²⁹ If the party entitled to enter judgment gives notice that he will tax certain costs, the question can only be raised upon taxation, not by a motion to set aside the pretended acceptance.³⁰

229. What is a more favorable judgment.—In determining whether an offer is more favorable than the recovery the question must be settled by the state of the pleadings at the time of the offer. If the verdict is increased by new matter set up in the amended complaint, or reduced by new matter set up in the amended answer, the addition must be considered.³¹ The same costs are recoverable when the appeal is heard by a supreme court justice, because the county judge is disqualified, as would have been allowed could the county judge have heard the case.³² This is so, although a new trial is granted on a case, which order is reversed by the appellate division.³³

230. Costs on appeal from county court to the appellate division of the supreme court.—Upon an appeal to the appellate division from a judgment rendered in the county court upon an appeal from a justice's judgment, costs upon affirmance are a matter of statutory right.³⁴ A judgment entered by default upon a defective verified complaint must be reversed with costs. The court has no discretion in the matter.³⁵

²⁹*Smith v. Dederick*, 18 Misc. 507, 42 N. Y. Supp. 1119; *Hollenback v. Knapp*, 42 Hun, 207; *Lauffer v. Bast*, 34 Misc. 408, 69 N. Y. Supp. 874.

³⁰*Hollenback v. Knapp*, 42 Hun, 207.

³¹*Adolph v. De Ceu*, 45 Hun, 130.

³²*O'Callaghan v. Carroll*, 16 How. Pr. 327; *Taylor v. Secley*, 4 How. Pr. 314, 3 N. Y. Code Rep. 84; *Davis v.*

Stone, 16 How. Pr. 538, 541; *Humiston v. Ballard*, 40 How. Pr. 40, 43; *Sheldon v. Albro*, 8 How. Pr. 305; *Horning v. Smith*, 19 N. Y. Civ. Proc. Rep. 142, 11 N. Y. Supp. 790.

³³*McLaughlin v. Smith*, 3 Hun, 250, 5 Thomp. & C. 522.

³⁴*Combs v. Combs*, 25 Hun, 279.

³⁵*Hurry v. Coffin*, 11 Daly, 180, 2 N. Y. Civ. Proc. Rep. 319; *Alburtis v. McCready*, 2 E. D. Smith, 39.

The plaintiff will not be charged with costs in the appellate court when it opens a default, because he would not open the default upon payment of disbursements and costs of the action, as there is no rule that he must accept the costs at his peril; and, further, it is a question whether the inferior court could open a default.³⁶ Where the order of a district court opening a default is reversed because of irregularities in the moving papers, the appellant is entitled to \$30.

Where the appellant, pending his appeal, pays the amount of the judgment to the respondent, he must appear and obtain the proper disposition of the case, or the attorney for the respondent may take an affirmance by default.³⁷ Where a verdict in the county court has been set aside, and then an offer of judgment is made and accepted, costs before and after notice of such new trial cannot be taxed, but only the costs regularly allowed on such appeals.³⁸

231. Costs on bastardy proceedings in the county court.—Where a defendant has been held on an order of affiliation by two justices, and has won on the trial and had judgment, with costs, under the provisions of § 873 of the Criminal Code, costs will be taxed as provided in § 3073 of the Code of Civil Procedure.³⁹

232. Special provisions relating to the municipal court of New York city. a. Motions.—Upon an appeal from an order which is remitted to the justice for a further hearing, the costs, as in the supreme court, are in the discretion of the court, and are the same in amount.⁴⁰

³⁶*Camp v. Stewart*, 2 E. D. Smith. 88. ⁴⁰*Strassner v. Thompson*, 40 App. Div. 28, 57 N. Y. Supp. 546; *Sando-*

³⁷*Adams v. Kearney*, 2 E. D. Smith, 42. *witz v. Duane*, 30 Misc. 630, 62 N. Y. Supp. 744, Reversing *Colwell v. Der-*

³⁸*Wheeler v. Mowers*, 16 Misc. 331, 39 N. Y. Supp. 731. *lin*, 20 Misc. 616, 46 N. Y. Supp. 450;

³⁹*Neary v. Robinson*, 98 N. Y. 81; *Szerlip v. Baier*, 21 Misc. 692, 47 N. Y. Supp. 1081; *Thornall v. Turner*, 23 Misc. 363, 51 N. Y. Supp. 214.

Superintendents of Poor v. Moore, 12 Wend. 273; *Rivenburgh v. Hen-*
ness, 4 Laus. 208.

b. Appeals.—If the order is reversed absolutely, the costs are \$30.⁴¹

c. Opening defaults.—A justice has no power to appoint a referee to take proof of facts upon a motion to open a default. If the parties stipulate that the unsuccessful party should pay the referee's fees, they must be recovered in an action. The justice cannot enter them in the judgment.⁴² If a party feels aggrieved at the terms imposed by the justice upon opening a default, he should appeal from the order. Appealing from the judgment will not bring the matter up.⁴³ By § 1367 of the New York charter, appeals from judgments of the city court of the city of New York must be taken as prescribed in articles 1 and 2 of title 8 of chapter 19 of the Code; but as New York county has not a county court the appeal must be taken to the supreme court. Although Kings, Queens, and Richmond counties have county courts, yet, to preserve uniformity the appeals go to the supreme court. The costs on appeals are governed by § 3067 of the Code of Civil Procedure, and not by § 3251.⁴⁴ There is no provision for a new trial in the appellate court. To perfect an appeal from an order opening a default the appellant must pay the costs and disbursements of the motion.⁴⁵ But he need not pay those items imposed by the justice, the power to impose which he seeks to review by the appeal.⁴⁶

d. Costs upon the reversal of the judgment.—Upon a reversal of a judgment the appellant is entitled to \$30 costs and disbursements, which includes the costs paid to perfect the appeal, and the disbursements of the appellant below, and the costs which

⁴¹*Strassner v. Thompson*, 40 App. Div. 28, 57 N. Y. Supp. 546.

⁴²*Szerlip v. Baier*, 21 Misc. 331, 47 N. Y. Supp. 133.

⁴³*Witowski v. Maisner*, 21 Misc. 487, 47 N. Y. Supp. 599.

⁴⁴*Mayer v. Friedman*, 30 Misc. 364, 30 N. Y. Civ. Proc. Rep. 221, 62 N. Y. Supp. 452.

⁴⁵*Schwartz v. Schendel*, 23 Misc. 473, 51 N. Y. Supp. 395; *Szerlip v. Bair*, 20 Misc. 588, 46 N. Y. Supp. 461.

⁴⁶*Schwartz v. Schendel*, 23 Misc. 473, 51 N. Y. Supp. 395.

should have been granted him had a proper judgment been rendered. The appellate court has no discretion as to costs.⁴⁷

c. Costs upon the affirmance of the judgment.—The appellate court has no discretion as to costs upon an affirmance. The respondent is entitled to \$25 costs, under § 3067 of the Code of Civil Procedure,⁴⁸ except where the respondent does not appear, in which case no costs will be granted.⁴⁹

f. Costs when the judgment is modified or a new trial is ordered.—Where a judgment is modified or a new trial ordered, costs are in the discretion of the appellate court.⁵⁰ Where the reversal is based upon the fact that it does not appear that the court has jurisdiction, costs will be denied the appellant, where he raises the question for the first time upon appeal, since he could have raised that question below.⁵¹ Where the general term of the city court dismisses an appeal with \$10 costs of motion, the clerk may tax \$10, the motion costs, and \$10 costs of the appeal, but he has no authority to tax any disbursements, as they were not granted.⁵² No costs can be taxed in an action commenced in the district or municipal court, and removed to the New York city court, as there is no statute governing such cases.⁵³

⁴⁷*Clark v. Carroll*, 1 N. Y. Civ. N. Y. Supp. 1078; *Janos v. Samstag*, Proc. Rep. 298 note; *Boomer v.* 31 Misc. 790, 65 N. Y. Supp. 223; *Brown*, 4 Daly, 229. *Tyroler v. Gummersbach*, 28 Misc.

⁴⁸*Canton Surgical & Dental Co. v.* 151, 59 N. Y. Supp. 266, 319; *Howell Webb*, 42 N. Y. S. R. 187, 16 N. Y. v. *Wright Dairy Co.* 31 Misc. 755, Supp. 932. 64 N. Y. Supp. 55.

⁴⁹*Lewis v. Hosey*, 26 Misc. 789, 56 ⁵²*Zinsser v. Herrman*, 24 Misc. 689, N. Y. Supp. 200. 53 N. Y. Supp. 778.

⁵⁰New York Charter, § 1367.

⁵³*Levene v. Hahner*, 62 App. Div.

⁵¹*Willis v. Parker*, 30 Misc. 750, 62 195, 70 N. Y. Supp. 913.

CHAPTER XXI.

SUBMISSION OF CONTROVERSY, ARBITRATION, INSOLVENT CORPORATIONS.

233. Costs on submitted controversy.

234. Costs on arbitration.

235. Costs in relation to insolvent corporations.

- a. Allowances to trustees who resist proceedings to have corporation declared insolvent.
- b. Allowances to creditors.
- c. Allowances to unsuccessful claimant.
- d. Allowances to receivers.

233. Costs on submitted controversy.—Where a controversy is submitted as provided by §§ 1279 and 1280 of the Code of Civil Procedure the costs are in the discretion of the court, if the submission is silent upon that question;¹ but costs cannot be taxed for any proceedings before notice of trial.² The parties, by stipulation, may waive the allowance of costs, but they cannot by stipulation compel the award of costs.³

Costs will be given to the successful party, when he has prepared the case and the only brief.⁴ Costs will not be ordered paid out of the share of people interested in obtaining a decision upon the question, but who were not parties to the agreement.⁵

An additional allowance cannot be granted in such a case.⁶

¹*Gray v. Daniels*, 18 App. Div. 466, 39 N. Y. Supp. 975, Overruling *Landon v. Walmoth*, 76 Hun, 271, 59 N. Y. Supp. 1106; *Herkimer County Light & P. Co. v. Johnson*, Y. S. R. 87, 27 N. Y. Supp. 717.

²37 App. Div. 257, 55 N. Y. Supp. 924. ⁴*Gray v. Daniels*, 18 App. Div. 465,

³Code Civ. Proc. § 1281; *Neilson v. Commercial Mut. Ins. Co.* 3 Duer, 45 N. Y. Supp. 1106.

⁵*House v. Raymond*, 3 Hun, 45, 5 455; *Boughton v. Seamans* 9 Hun, Thomp. & C. 248.

⁶*People v. Fitchburg, R. Co.* 133

⁷*Real Estate Corporation v. Harper*, 174 N. Y. 123, 66 N. E. 660; E. 1011.

Brennen v. North, 7 App. Div. 79,

234. Costs on arbitration.—Upon the granting of an order confirming, modifying, correcting, or vacating an award made in a controversy submitted to arbitration, costs of the application not exceeding \$25 and disbursements may be awarded to the prevailing party by the court in its discretion.⁷ A party who revokes an arbitration before the award is liable to the opposite party for his costs and disbursements.⁸

235. Costs in relation to insolvent corporations. *a. Allowances to trustees who resist proceedings to have corporation declared insolvent.*—Trustees of a corporation whose corporate existence is attacked should be afforded the means to resist such an attack, if such defense is made in good faith and with the conviction that the corporation is solvent and that it has a right to conduct its own business. The court that passes upon the question of solvency of the corporation may allow, either at the trial or on appeal, taxable costs to the directors of the corporation, payable out of the fund, if, in its opinion, the resistance has been justified thus far. The court that administers the funds may, in its discretion, determine up to what stage in the proceedings the opposition was proper, and what would be a reasonable sum to be allowed for the services rendered, or whether any allowance should be made. The directors are not entitled, as a matter of right, to be reimbursed for the amount paid their attorney in these proceedings.⁹ But if the officers know that the corporation is insolvent, and still defend the proceedings, no allowance can be made to them or their attorneys for their services in opposing the proceedings to have the corporation declared insolvent.¹⁰

⁷ Code Civ. Proc. §§ 2377, 2378.

⁹*Barnes v. Newcomb*, 89 N. Y. 108;

⁸ Code Civ. Proc. § 2384; *Kent v. Crouse*, 5 N. Y. S. R. 141; *Union Ins. Co. v. Central Trust Co.* 36 N.

Re Importers & Grocers Exchange, 15 Daly, 419, 8 N. Y. Supp. 322.

¹⁰*People v. Commercial Alliance Ins. Co.* 91 Hun, 389, 70 N. Y. S. R. 823, 36 N. Y. Supp. 248.

Further Appeal, 87 Hun, 140, 66 N. Y. S. R. 876, 33 N. Y. Supp. 1135.

b. Allowances to creditors.—The court has no power to grant an allowance to a creditor or his attorney who has intervened in the matter and has rendered valuable services therein;¹¹ nor can they be allowed taxable costs.¹² The attorney general has no authority to appoint special counsel to act generally for him in the conduct of suits, and allowances to such special counsel are not authorized.¹³

c. Allowances to unsuccessful claimant.—A claimant who has been unsuccessful in all the courts, including the court of appeals, and has obtained no allowance, cannot after the adverse decision in the court of appeals apply to the special term for an allowance.¹⁴

d. Allowances to receivers.—The receiver of a corporation is entitled to be allowed his reasonable expenses for attorney's services in all of his proceedings. But an *ex parte* allowance for such a service is a nullity.¹⁵ Objections to the allowance must be made when the allowance is asked for. If none are raised then, they cannot be raised later, except that charges for services which were not rendered to the receiver, but to the corporation, or charges that the receiver was not authorized to incur, such as prosecuting in a criminal proceeding one who has defrauded or attempted to defraud the receiver, may be stricken out on appeal.¹⁶ The proper method to obtain an allowance for service of the attorney upon an accounting is to conduct the proceedings to its termination, and then, upon the entry of the final order, apply for and obtain an allowance for his necessary counsel fee.¹⁷ In ascertaining the amount to be allowed to a receiver for legal services the items to be considered are:

¹¹*Atty. Gen. v. North American L. Ins. Co.* 91 N. Y. 57, 43 Am. Rep. 648; *People ex rel. Atty. Gen. v. Security L. Ins. Co.* 71 N. Y. 222.

¹²*Atty. Gen. v. Continental L. Ins. Co.* 27 Hun, 195, 63 How. Pr. 129, Appeal Dismissed in 90 N. Y. 45.

¹³*Atty. Gen. v. Continental L. Ins. Co.* 88 N. Y. 571.

¹⁴*People v. Security L. Ins. & Annuity Co.* 23 Hun, 596.

¹⁵*Re Commonwealth F. Ins. Co.* 32 Hun, 78, 19 N. Y. Week. Dig. 57.

¹⁶*Re Little*, 47 App. Div. 22, 62 N. Y. Supp. 27.

¹⁷*Re Little*, 47 App. Div. 22, 62 N. Y. Supp. 27.

1. The amount involved.¹⁸
2. The interests involved, meaning the relative importance to the client of the success or failure.
3. The questions of law involved, their intricacy, difficulty, or novelty.
4. The labor and responsibility involved.
5. The result of the services, whether successful or not.

As to the lawyer, the items to be considered are:

1. Learning required, and the scope and thoroughness of the learning.
2. The labor performed by him, his "tact" and judiciousness of movement, his perfect integrity, and his assiduity in the interest of his client.¹⁹

A proceeding to compel the receiver of a bank to pay certain notes out of the funds in his hands is not a motion under § 768 of the Code of Civil Procedure, but a special proceeding under § 3334, and the costs thereof are governed by § 3240.²⁰

A receiver will be ordered to pay the costs awarded against him in an action originally brought against the corporation, where such costs were incurred for the benefit of the fund, and all preferred claims have been paid.²¹

¹⁸*Garfield v. Kirk*, 65 Barb. 464; ²⁰*People v. City Bank*, 96 N. Y. 32.
¹⁹*People v. Bond Street Sav. Bank*, N. Y. Civ. Proc. Rep. 31.

²¹10 Abb. N. C. 15.

CHAPTER XXII.

SECURITY FOR COSTS.

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- 262. When trustees in bankruptcy are required to give security for costs.

236. In general.— The statutory provisions relating to security for costs are contained in §§ 3268–3279 of the Code of Civil Procedure. The provisions of § 3268 do not violate the 14th

Amendment of the United States Constitution.¹ These provisions relate only to actions brought by the classes of persons enumerated therein, and not to actions brought against them.² The provisions requiring security for costs in certain cases are general, and cover actions for torts as well as those on contract.³ These provisions are made, by § 3279 of the Code of Civil Procedure, applicable to special proceedings, yet they are not applicable to supplementary proceedings.⁴

237. In what courts.— These provisions relate only to actions brought in those courts of record specified in subd. 4 of § 3347 of the Code of Civil Procedure, as provided in subd. 13 of § 3347.⁵ By amendment to § 3074 by the Laws of 1903, the provisions of §§ 3268–3279 were made applicable to actions brought in courts of justices of the peace by foreign corporations. The defendant cannot demand security when he has had an action removed from a court not of record to one of record.⁶ In such a case, where the plaintiff moves for a commission to take testimony, the court may, in its discretion, refuse to grant him a commission unless he gives security for costs.⁷

Parties brought in as defendants under the provision of § 452 of the Code of Civil Procedure cannot be compelled to give security for costs, because their right of intervention is absolute.⁸ The fact that the plaintiff has given an undertaking upon commencing a replevin action,⁹ or upon obtaining a warrant of

¹*Venanzio v. Weir*, 64 App. Div. Proc. Rep. 324, 9 N. Y. Supp. 743; 483, 72 N. Y. Supp. 234.

²*Kelly v. Kelly*, 77 App. Div. 519, ⁷*Hames v. Judd*, 16 Daly, 110, 18 N. Y. Supp. 918. N. Y. Civ. Proc. Rep. 327, 30 N. Y.

³*Keller v. Townsend*, 2 Abb. N. C. S. R. 666, 9 N. Y. Supp. 743.

⁴*Coryell v. Davis*, 5 Hill, 559. ⁵*Herzog v. Tamsen*, 22 Misc. 766,

⁶*First Nat. Bank v. Yates*, 21 Misc. 27 N. Y. Civ. Proc. Rep. 165, 49 N. Y. Supp. 1015; *Uhlfelder v. Tamsen*,

⁷*Re Rasch*, 26 Misc. 459, 28 N. Y. 17 Misc. 296, 40 N. Y. Supp. 372.

Civ. Proc. Rep. 98, 55 N. Y. Supp. ⁸*Boucher v. Pia*, 8 Bosw. 691, 14

434; *Loughrill v. Downey*, 27 N. Y. Abb. Pr. 1.

S. R. 51, 7 N. Y. Supp. 503.

⁹*Hames v. Judd*, 18 N. Y. Civ.

attachment,¹⁰ or procuring an injunction,¹¹ or procuring an order of arrest, does not affect the right to security for costs,¹² because the costs of the action are not protected by these undertakings.

238. Order, how obtained; effect of order; by what courts granted.—An order may be obtained *ex parte* when it is made under the provisions of §§ 3268, 3269, and 3270 of the Code of Civil Procedure, because the defendant has an absolute right to the security, and the judge has no discretion.¹³ But where the defendant has been guilty of laches in moving for security the court can grant the order or not, in its discretion, and the defendant must excuse his delay.¹⁴

The defendant may obtain a chamber's order *ex parte*, directing security to be filed in twenty days, and, if not so filed, to show cause at the next special term after the expiration of said twenty days why such security should not be filed, which order to show cause should contain a stay. After the hearing at special term, if the motion is granted a peremptory order is granted. If the security is not filed after the entry of the peremptory order a motion may be made for judgment of nonprosecution, or the party may apply to the court, in the first instance,

¹⁰*Woodward v. Stearns*, 11 Abb. Pr. 114, 17 N. Y. S. R. 295, 2 N. Y. Supp. N. S. 445; *Hodges v. Porter*, 10 Hun, 304; *Churchman v. Merritt*, 50 Hun, 244.

¹¹*McCall v. Frith*, 2 N. Y. Civ. Proc. Rep. (Browne) 9, note. 19 N. Y. S. R. 171, 2 N. Y. Supp. 843; *Swift v. Wheeler*, 46 Hun, 580.

¹²*Sutorius v. North*, 20 N. Y. Civ. Proc. Rep. 162, 36 N. Y. S. R. 873, 13 N. Y. Supp. 557, further appeal, 1 Misc. 298, 48 N. Y. S. R. 694, 20 N. Y. Supp. 726; *Sperry v. Hellman*, 20 N. Y. Civ. Proc. Rep. 218, 37 N. Y. S. R. 258, 13 N. Y. Supp. 899; *Strong v. Sprout*, 53 N. Y. 497, 499. 13 N. Y. Civ. Proc. Rep. 343, 27 N. Y. Week. Dig. 512, 12 N. Y. S. R. 737; *Schwartz v. Scott*, 25 N. Y. Civ. Proc. Rep. 53, 70 N. Y. S. R. 380, 35 N. Y. Supp. 607; *Mitchell v. Dick*, 8 Misc. 98, 60 N. Y. S. R. 161, 28 N. Y. Supp. 1003; *Wicker v. Elmira Heights*, 42 App. Div. 426, 59 N. Y. Supp. 130; *Pursley v. Rodgers*, 44 App. Div. 139, 61 N. Y. Supp. 1015.

¹³*Robertson v. Barnum*, 29 Hun, 657; *McDonald v. Peet*, 7 N. Y. Civ. Proc. Rep. 200; *Kamermann v. Eisner & M. Co.* 23 Misc. 330, 51 N. Y. Supp. 210; *Wood v. Blodgett*, 49 Hun, 64, 15 N. Y. Civ. Proc. Rep. ¹⁴*Schwartz v. Scott*, 25 N. Y. Civ. Proc. Rep. 53, 70 N. Y. S. R. 380, 35 N. Y. Supp. 607.

upon notice to the opposite party, for a peremptory order requiring the filing of security for costs.¹⁵ When an application is made under § 3271 of the Code of Civil Procedure, it must be made on notice.¹⁶ When a motion for an order requiring security has been denied, no further application for security can be made without leave of the judge who decided the first motion.¹⁷

When an order has been made directing the filing of security, it will remain in force till an order is made vacating it.¹⁸ A defendant can move *ex parte* for security for costs on appeal, if he has not moved before.¹⁹ The court in its discretion can compel the plaintiff to not only give security for costs on appeal, but also security for the costs that have accrued.²⁰ But such an order must be based upon notice to the plaintiff.²¹

The appellate court will seldom interfere with the use of the discretion of the court below.²² A county judge cannot make such an order in a supreme court action.²³ A plaintiff's complaint cannot be dismissed upon the hearing of an order to file security, or show cause why he should not file security, for costs. The only order that the court can make in such a case is an order

¹⁵*Cadwell v. Manning*, 15 Abb. Pr. 271, 24 How. Pr. 38.

¹⁷*Worman v. Frankish*, 32 N. Y. S. R. 235, 11 N. Y. Supp. 35.

¹⁶*Swift v. Wheeler*, 46 Hun, 580, 13 N. Y. Civ. Proc. Rep. 343, 27 N. Y. Week. Dig. 512, 12 N. Y. S. R.

¹⁸*Sproull v. Star Co.* 27 Misc. 27, 56 N. Y. Supp. 1001.

737; *Ryan v. Potter*, 4 N. Y. Civ. Proc. Rep. 80, 2 N. Y. Civ. Proc. Rep. (McCarthy) 33; *Wood v. Blodgett*, 49 Hun, 64, 15 N. Y. Civ. Proc. Rep. 114, 17 N. Y. S. R. 295, 2 N. Y. Supp. 304; *Champlin v. Pierce*, 3

¹⁹*Wood v. Blodgett*, 49 Hun, 64, 15 N. Y. Civ. Proc. Rep. 114, 17 N. Y. S. R. 295, 2 N. Y. Supp. 304; *Gifford v. Rising*, 48 Hun, 128.

Wend. 445; *Blanchard v. Nessel*, 6 Hill, 256; *Churchman v. Merritt*, 50

²⁰*Gedney v. Purdy*, 47 N. Y. 676.

Hun, 270, 2 N. Y. Supp. 843; *Mitchell v. Dick*, 8 Misc. 98, 60 N. Y. S. R. 161, 28 N. Y. Supp. 1003; *Kanermann v. Eisner & M. Co.* 23 Misc. 330, 51 N. Y. Supp. 210; *Pursley v. Rodgers*, 44 App. Div. 139, 61 N. Y. Supp. 1015; *McNeil v. Merriam*, 57 App. Div. 164, 9 N. Y. Anno. Cas. 382, 68 N. Y. Supp. 165.

²¹*Wood v. Blodgett*, 49 Hun, 64, 15 N. Y. Civ. Proc. Rep. 114, 17 N. Y. S. R. 295, 2 N. Y. Supp. 304.

²²*Fessenden v. Blanchard*, 48 Hun, 350, 14 N. Y. Civ. Proc. Rep. 277, 51 N. Y. S. R. 871, 1 N. Y. Supp. 105; *Barnes v. Seligman*, 51 N. Y. S. R. 376, 22 N. Y. Supp. 45.

²³*Longstreet v. Sawyer*, 21 N. Y. Civ. Proc. Rep. 16, 39 N. Y. S. R. 693, 15 N. Y. Supp. 608.

requiring the plaintiff to file security within a fixed time, and upon proof of his failure to do so the court could dismiss the complaint with costs, under § 3277 of the Code of Civil Procedure,²⁴ which is the most that can be done.²⁵ The court can refuse to dismiss the complaint, where security is filed after the time limited in the order, and before the motion to dismiss the complaint on that account is heard.²⁶

If, after security has been filed, the complaint is dismissed because of noncompliance with some other part of the order requiring the filing of security, the sureties are not liable upon their bond, because the dismissal of the complaint was a non-acceptance of the bond.²⁷ Upon the original application the court can require security only to the amount of \$250, although there may be many defendants and such amount is not sufficient for all the defendants,²⁸ because, where there are two or more defendants, each cannot require security for costs. The bond given is for the security of all.²⁹ The court may, as a condition of reviving an action for costs against an executor of a deceased defendant, under § 577 of the Code of Civil Procedure, require the plaintiff to file security.³⁰

239. Additional security.—Where one order is made requiring security for costs, all further orders must be made under § 3276 of the Code of Civil Procedure, and the plaintiff is not estopped from denying the authority of the court, because he has complied with the first order.³¹ The court will order additional security

²⁴*Requard v. Theiss*, 18 Misc. 563, 42 N. Y. Supp. 460. Affirmed in 19 Misc. 480, 43 N. Y. Supp. 1066.

²⁵*Hinman v. Pierce*, 50 Hun. 209, 16 N. Y. Civ. Proc. Rep. 138, 19 N. Y. S. R. 390, 2 N. Y. Supp. 861.

²⁶*Cornuel v. Heinze*, 51 N. Y. S. R. 461, 22 N. Y. Supp. 117; *Winchester v. Brown*, 51 Hun. 284, 21 N. Y. S. R. 864, 4 N. Y. Supp. 155.

²⁷*Remington v. Westermann*, 21 Hun. 441, 10 N. Y. Week. Dig. 251.

²⁸*Gates v. McDonald*, 39 N. Y. S. R. 128, 14 N. Y. Supp. 907.

²⁹*Leftwick v. Clinton*, 26 How. Pr.

³⁰*Knoch v. Funke*, 28 Abb. N. C. 240, 22 N. Y. Civ. Proc. Rep. 161, 47 N. Y. S. R. 503, 19 N. Y. Supp. 242.

³¹*Newhall v. Appleton*, 25 Jones & S. 154, 23 Abb. N. C. 62, 25 N. Y. S. R. 810, 6 N. Y. Supp. 4.

upon proof of facts that the present security is insufficient.³² But mere allegation that the security is insufficient will not suffice.³³ Where a nonresident plaintiff and his surety both die, and the estate of the surety is insolvent, the defendant is entitled to have a new surety.³⁴ The plaintiff will not be compelled to give additional security where he has recovered a verdict, as there is every intendment of his ultimate success.³⁵ But that does not apply where the trial judge orders the exceptions heard at the appellate division in the first instance, because that shows a doubt in the mind of the judge as to some important question of law.³⁶

Before 1891 no additional security could be required where the plaintiff made a deposit in money; but now additional security may be demanded in every case, upon proof of the proper facts. Cases that held that additional security could not be required in such cases are now overruled by that amendment.³⁷

240. Form of bond.—The court cannot compel a plaintiff to unite with his sureties in the undertaking.³⁸ Where there are two or more defendants the undertaking should run to all the defendants, as it is for the benefit of all,³⁹ unless some of the defendants waive security, and this cannot be inferred because they did not move for security.⁴⁰ The undertaking should be

³²*Fogg v. Edwards*, 57 How. Pr. 290, 6 N. Y. Week. Dig. 493.

³³*Nugent v. Keenan*, 21 Jones & S. 530; *Fogg v. Edwards*, 57 How. Pr. 290, 6 N. Y. Week. Dig. 493; *Brewster v. Wooster*, 9 Misc. 690, 24 N. Y. Civ. Proc. Rep. 83, 62 N. Y. S. R. 123, 30 N. Y. Supp. 546.

³⁴*Tracy v. Dolan*, 31 App. Div. 24, 52 N. Y. Supp. 351.

³⁵*Brackett v. Griswold*, 46 Hun, 442, 12 N. Y. S. R. 402; *New York Health Department v. O'Reilly*, 17 Jones & S. 524, 18 N. Y. Week. Dig. 255; *Flint v. Van Deusen*, 24 Hun, 440.

³⁶*Peck v. Phoenix Ins. Co.* 2 Silv. Sup. Ct. 342, 24 N. Y. S. R. 646, 18 N. Y. Week. Dig. 505, 5 N. Y. Supp. 543.

³⁷*Honduras v. Soto*, 112 N. Y. 310, 2 L. R. A. 642, 8 Am. St. Rep. 744, 19 N. E. 845.

³⁸*Ellensohn v. Haselbach*, 17 Misc. 92, 25 N. Y. Civ. Proc. Rep. 345, 39 N. Y. Supp. 332; *Wagner v. Adams*, 1 How. Pr. 191; *Micklethwaite v. Rhodes*, 4 Sandf. Ch. 434.

³⁹*Leftwick v. Clinton*, 26 How. Pr. 26; *Rothschild v. Wilson*, 24 Abb. N. C. 123, 19 N. Y. Civ. Proc. Rep. 76, 10 N. Y. Supp. 61; *McDonald v. Brass Goods Mfg. Co.* 2 Abb. N. C. 434; *Gates v. McDonald*, 39 N. Y. S. R. 128, 14 N. Y. Supp. 907.

⁴⁰*Donner v. Ogilvie*, 12 N. Y. Civ. Proc. Rep. 399.

conditioned for payment upon demand of the obligors, and not on demand of the plaintiff,⁴¹ and should, in express terms, bind his heirs, executors, and administrators.⁴² If the bond leaves out the words that surety will pay "on demand," this will be a sufficient compliance, as this wording is more favorable to the defendant than the statute, as under this the surety would be liable immediately and without demand.⁴³ A bond which does not contain a penalty does not conform to the statute, but that defect may be waived and the surety will be liable thereon to the extent of the statutory amount,⁴⁴ or even in excess of that amount.⁴⁵ The defendant must object to the undertaking within the time allowed by law, or he will not afterward be heard to object.⁴⁶

241. Deposit of money.—Where the plaintiff gives security which is disapproved by the appellate division, he may deposit money in compliance with the original order.⁴⁷ After the plaintiff obtains judgment, he may make a motion to withdraw the money and it is no answer to such a motion that the defendant intends to appeal or has appealed, because the presumption is that the judgment will be upheld.⁴⁸ There is a special term decision that an order allowing the plaintiff to withdraw his cash security cannot be granted until the time to appeal has expired, holding that the court would not grant an order directing the surrender of the undertaking at that stage of the action.⁴⁹

242. Deposit by third person.—There is a diversity of opinion

⁴¹*Montague v. Bassett*, 18 Abb. Pr. 13; *Tallmadge v. Wallis*, 1 How. Pr. 100.

⁴²*Schenck v. Rowell*, 1 Abb. N. C. 295.

⁴³*Smith v. Norral*, 2 Sandf. 653, 2 N. Y. Code Rep. 14.

⁴⁴*Van Camp v. Ross*, 9 Abb. N. C. 390, note.

⁴⁵*Warner v. Ross*, 9 Abb. N. C. 385.

⁴⁶*Castellanos v. Jones*, 4 Sandf. 679.

⁴⁷*Winchester v. Broome*, 27 N. Y. S. R. 361, 8 N. Y. Supp. 82.

⁴⁸*Hoffman v. Lowell*, 4 N. Y. Civ. Proc. Rep. 103; *Kokomo Straw Board Co. v. Sachs*, 4 Silv. Sup. Ct. Rep. 150 (note on "Security for Costs.") 17 N. Y. Civ. Proc. Rep. 432, 26 N. Y. S. R. 589, 7 N. Y. Supp. 179.

⁴⁹*First Nat. Bank v. Hall*, 19 Misc. 278, 44 N. Y. Supp. 255.

as to the ownership of money deposited by a third person, in lieu of security for the plaintiff. Some cases hold that the money belongs to the third person and is subject only to the contingency of being used to apply upon the costs of the defendant in suit.⁵⁰ This is the correct interpretation of the law on this point. Other cases, however, hold that the money belongs to the plaintiff, and that the depositor is the creditor of the plaintiff.⁵¹

243. Appeal taken by plaintiff without staying proceedings under the judgment.—If the defendant wins and the plaintiff appeals, without giving security, the defendant may, upon motion, have his costs paid out of the deposit.⁵² But if the plaintiff ultimately wins, he may make a motion for restitution, or he may bring an action against the defendant for the money thus taken out of the court.⁵³

244. Deposit upon obtaining order of arrest.—Where the plaintiff made a deposit upon having the defendant arrested in an action, the costs of a motion for defendant's discharge and of the appeals thereon which were ultimately successful are properly ordered paid out of the deposit, and should not be held to await the outcome of the action. The defendant was entitled to compensation when either of two things happened—his discharge from arrest, or judgment in his favor.⁵⁴

245. Liability of attorney for plaintiff of whom defendant could demand security.—An attorney is liable to the extent of \$100 for costs, where he commences an action for a plaintiff of whom the defendant can demand security as a right, under § 3268 of

⁵⁰*Fraser v. Ward*, 13 Daly, 431, 9 N. Y. Civ. Proc. Rep. 11. Affirming in effect, 2 How. Pr. N. S. 47. ⁵²*McCall v. Frith*, 4 N. Y. Civ. Proc. Rep. 102.

⁵¹*Lyon v. Wilder*, 24 Jones & S. 67, 12 N. Y. Civ. Proc. Rep. 93, 6 N. Y. S. R. 288; *Lott v. Swezey*, 29 Barb. S. R. 875, 1 N. Y. Supp. 421; *Salter v. Weiner*, 6 Abb. Pr. 191; *Herman Co.*, 56 N. Y. 671.

⁵³*Badger v. Appleton*, 14 Daly, 192, 12 N. Y. Civ. Proc. Rep. 93, 6 N. Y. S. R. 288; *Lott v. Swezey*, 29 Barb. S. R. 875, 1 N. Y. Supp. 421; *Salter v. Weiner*, 6 Abb. Pr. 191; *Herman Co.*, 56 N. Y. 671.

⁵⁴*Tunstall v. Winton*, 31 Hun, 231. *Commercial Warehouse Co. v. Graber*, Affirmed in 96 N. Y. 660, 45 N. Y. 393.

the Code of Civil Procedure, and the attorney does not cause security to be filed;⁵⁵ or where he brings an action for a corporation that has ceased to exist;⁵⁶ but only in the courts specified in subd. 4 of § 3347 of the Code of Civil Procedure, as limited by subd. 13 of § 3347.

If the liability once attaches it is not removed by the substitution of another attorney,⁵⁷ such substituted attorney being also liable.⁵⁸ This liability can be removed only by causing the plaintiff to file security.⁵⁹

The defendant does not waive his right to hold the plaintiff's attorney for these costs by moving for security for costs, which is either not granted on account of laches, or, if granted, is not filed.⁶⁰ If the plaintiff of record is a nonresident, though the real plaintiff is a resident, the attorney is liable.⁶¹ Such liability may be enforced summarily by order.⁶²

Upon a motion to compel the attorney to pay costs the moving party must show that the plaintiff comes within the terms of § 3268 of the Code of Civil Procedure.⁶³ An attorney is only liable for costs in those cases where the plaintiff is a nonresident at the time of the commencement of the action, and not where he becomes a nonresident pending the action; therefore, in order to compel the attorney to pay the costs of the action, it must be

⁵⁵*Hulburt v. Newell*, 4 How. Pr. 93, 2 N. Y. Code Rep. 54; Code Civ. Proc. § 3278; *Long v. Hall*, 3 Sandf. 729, N. Y. Code Rep. N. S. 114.

⁵⁶*Attleboro Nat. Bank v. Wendell*, 64 Hun. 208, 22 N. Y. Civ. Proc. Rep. 225, 46 N. Y. S. R. 140, 19 N. Y. Supp. 45; *Re Rasch*, 26 Misc. 459, 28 N. Y. Civ. Proc. Rep. 98, 55 N. Y. Supp. 434.

⁵⁷*Esty v. Trowbridge*, 1 Month. L. Bull. 55; *Gillespie v. Stanless*, 1 How. Pr. 101.

⁵⁸*Renwick v. New York Central Coal Co.* 23 Jones & S. 444, 14 N. Y. Civ. Proc. Rep. 114, 14 N. Y. S. R. 758.

⁵⁹*Renwick v. New York Central Coal Co.* 23 Jones & S. 444, 14 N. Y. Civ. Proc. Rep. 114, 14 N. Y. S. R. 758.

⁶⁰*Re Levy*, 10 Daly. 391, 2 N. Y. Civ. Proc. Rep. 108; *Boyle v. Bates*, 8 How. Pr. 495; *Krom v. Kursheedt*, 19 Jones & S. 119, 6 N. Y. Civ. Proc. Rep. 371, 1 How. Pr. N. S. 38; *Cobb v. Robinson*, 1 How. Pr. 235.

⁶¹*Jones v. Sarage*, 10 Wend. 621; *Waring v. Barret*, 2 Cow. 460.

⁶²*Willmont v. Meserole*, 48 How. Pr. 439, 16 Abb. Pr. N. S. 308; *Jones v. Sarage*, 10 Wend. 621; *Sigourney v. Waddle*, 9 Paige, 381.

⁶³*Moir v. Brown*, 9 How. Pr. 270;

made to appear affirmatively that the plaintiff was a nonresident at the time the action was commenced.⁶⁴

A motion to compel the appellant's attorneys to pay costs personally after the dismissal of an appeal should be made in the court below, after judgment has been entered there. It cannot be made in the appellate court.⁶⁵ An attorney who becomes a surety must be proceeded against in an action to enforce his liability upon his undertaking, and not summarily upon motion.⁶⁶

246. Right to security for costs lost by laches.—The absolute right which the law gives the defendant to demand security for costs may be waived by laches. Thereafter it rests in the discretion of the court whether security shall be given or not. In the first department the absolute right is lost by the service of the answer.⁶⁷ But extensions of time to answer are not waivers.⁶⁸ The city court of New York applies the same rule.⁶⁹ This view is not adopted in the third department.⁷⁰

In the other departments the question of this limitation has not been passed on, but all hold that the defendant must move promptly, as soon as he learns that he is entitled to security.⁷¹

Long v. Hall, 3 Sandf. 729. N. Y. Supp. 670; *Segal v. Cauldwell*, 22 App. Div. 95, 47 N. Y. Supp. 839.

⁶⁴*Moir v. Brown*, 9 How. Pr. 270; ⁶⁵*Cooke v. Metropolitan Street R. Co.* 59 App. Div. 154, 69 N. Y. Supp. 4; *Johnson v. Metropolitan Street R. Co.* 56 App. Div. 286, 9 N. Y. Anno. Cas. 70, 67 N. Y. Supp. 855; *Scandinavian American Bank v. Lentz*, 30 App. Div. 485, 52 N. Y. Supp. 350.

⁶⁶*Struffman v. Muller*, 74 N. Y. 594. ⁶⁷*Dwyer v. McLaughlin*, 27 Misc. 187, 57 N. Y. Supp. 220.

⁶⁸*Willmont v. Meserole*, 48 How. Pr. 430, 16 Abb. N. S. 308; *Hubbard v. Giequel*, 14 N. Y. Civ. Proc. Rep. 15, 15 N. Y. S. R. 397. ⁶⁹*Wicker v. Elmira Heights*, 42 App. Div. 426, 59 N. Y. Supp. 130.

⁷⁰*Henderson, H. & Co. v. McNally*, 33 App. Div. 132, 28 N. Y. Civ. Proc. Rep. 178, 6 N. Y. Anno. Cas. 166, 53 N. Y. Supp. 351; *Corbett v. Brantingham*, 65 App. Div. 335, 72 N. Y. Supp. 763; *Schwartz v. Scott*, 25 N. Y. Civ. Proc. Rep. 53, 70 N. Y. S. R. 380, 35 N. Y. Supp. 607; *Stevenson v. New York, L. E. & W. R. Co.* 49 Hun. 169, 16 N. Y. S. R. 787, 1 N. Y. v. *Blodgett*, 49 Hun. 64, 15 N. Y. Civ.

A defendant has a right to move whenever a new proceeding is instituted, wherein he may become entitled to the benefits of the provisions of the Code of Civil Procedure for the security of the future costs, but not for the costs that have accrued, security for which he has waived.⁷² But the court has power upon such an application to order security for the costs of the entire proceedings.⁷³

247. What is a sufficient excuse for laches.— It rests upon the defendant to excuse his laches.⁷⁴ The fact that the delay occurred during the summer vacation has been considered sufficient.⁷⁵ Where the fact of nonresidence first appeared on the trial, a motion made three days after the trial was made in time.⁷⁶ The fact that the plaintiff's attorney verified the complaint, because the plaintiff was not within the county, does not give notice of nonresidence, but implies, rather, that the absence was temporary.⁷⁷ A delay of three days after the discovery that the plaintiff was a nonresident, before moving for security for costs, has been held not to be laches.⁷⁸ If the plaintiff obtains an order as an absolute right, after he has been guilty of laches, it will be set aside.⁷⁹

248. What is not a sufficient excuse for laches.— In the following cases the laches of the defendant were such that the court, in its discretion, denied a motion for security for costs: Where the

Proc. Rep. 114, 17 N. Y. S. R. 295, Proc. Rep. 384, 16 N. Y. S. R. 787, 2 N. Y. Supp. 304; *Florence v. Bulkley*, 1 Duer, 706; *Sterenson v. New York, L. E. & W. R. Co.* 49 Hun. 169, 14 N. Y. Civ. Proc. Rep. 384, 16 N. Y. S. R. 787, 1 N. Y. Supp. 670; *Swan v. Mathews*, 3 Duer, 613; *Lewis v. Farrell*, 14 Jones & S. 358.

⁷²*Turell v. Eric R. Co.* 46 App. Div. 296, 61 N. Y. Supp. 308; *Gifford v. Rising*, 48 Hun. 128, 14 N. Y. Civ. Proc. Rep. 172, 28 N. Y. Week. Dig. 327, 15 N. Y. S. R. 596.

⁷³*Segal v. Cauldwell*, 22 App. Div. 95, 47 N. Y. Supp. 839; *Hayes v. Second Ave. R. Co.* 5 Month. L. Bull. 92.

⁷⁴*Boucher v. Pia*, 8 Bosw. 691, 14 Abb. Pr. 1.

⁷⁵*Willson v. Evelyn*, 39 App. Div. 129, 56 N. Y. Supp. 632.

⁷⁶*Boucher v. Pia*, 8 Bosw. 691, 14 Abb. Pr. 1.

⁷⁷*Buckley v. Gutta Percha & Rubber Mfg. Co.* 3 N. Y. Civ. Proc. Rep. 428, 17 N. Y. Week. Dig. 141.

⁷⁸*Runney v. Stringer*, 4 Bosw. 663.

⁷⁹*Sterenson v. New York, L. E. & W. R. Co.* 49 Hun. 169, 14 N. Y. Civ.

defendant examined the plaintiff before trial, and the case was on the calendar and about to be reached;⁸⁰ where the complaint showed that the defendant was entitled to security, but he obtained two extensions of time to answer, and afterwards answered, and both parties noticed the case for trial;⁸¹ where an action was commenced in December, two residents of the state became plaintiffs in April, the complaint was served in May, and the motion for security was served in July, before the answer was served;⁸² where an action was commenced in the first department in July, the answer was served in October, and on October 30 a motion was made for security;⁸³ where an action was commenced in February, and there had been two arguments on the defendant's demurrers, and the defendant had examined one of his witnesses before trial, the complaint was dismissed, but the plaintiff was allowed to serve, in July, an amended complaint upon his paying costs, when the motion for security was made before the service of answer;⁸⁴ where the defendant knew of his right to security from the time of the commencement of the action on July 31, and his time to answer was extended to December 6, when he demurred, and the case was placed on the January and February calendars, but before the commencement of the February term he moved for security;⁸⁵ where the defendant served with his answer an order to file security, which order was set aside, and two months elapsed before a motion was made for the plaintiff to file security; the first order having been set aside, could not aid the defendant on this motion;⁸⁶

⁸⁰*Boylan v. Mathews*, 3 N. Y. Civ. Proc. Rep. 38.

⁸¹*Fearn v. Gelpcke*, 13 Abb. Pr. 473; *Boylan v. Mathews*, 3 N. Y. Civ. Proc. Rep. 38; *Smith & B. Brass Works v. Kahn*, 18 Misc. 597, 42 N. Y. Supp. 478; *Hale v. Mason*, 86 Hun, 499, 67 N. Y. S. R. 535, 33 N. Y. Supp. 789.

⁸²*Sims v. Bonner*, 28 Jones & S. 63, 16 N. Y. Supp. 800

⁸³*Todd v. Marsily*, 15 N. Y. Civ. Proc. Rep. 247, 7 N. Y. S. R. 872, 26 N. Y. Week. Dig. 244.

⁸⁴*Fagan v. Strong*, 19 N. Y. Civ. Proc. Rep. 88, 11 N. Y. Supp. 766.

⁸⁵*McDonald v. Peet*, 7 N. Y. Civ. Proc. Rep. 200.

⁸⁶*Weber v. Moog*, 12 Abb. N. C. 108.

where the defendant does not demand security till after the commencement of the trial;⁸⁷ where the action had been tried twice, and the complaint was dismissed upon the third trial, and the motion was made eleven days after that trial.⁸⁸

A delay of nearly a year in moving for security has been held fatal to the motion.⁸⁹ Also a delay of twenty years.⁹⁰ Where the plaintiff removed from the state in September, and an interlocutory judgment was entered in November, and after several hearings before the referee the motion was made and denied. Under the Revised Statutes the entry of the interlocutory judgment was fatal to such a motion.⁹¹ A defendant was held guilty of such laches as to defeat his absolute right for security for costs where he obtained, *ex parte*, an order requiring security for costs, two years after the commencement of the action, when he could have learned of the nonresidence of the plaintiff by inquiring of his attorney. In this case, however, the court refused to set aside this order, because the plaintiff was guilty of laches in moving to set aside the order.⁹²

Where the defendant learned on September 1st that the plaintiff was a nonresident, but did not move until November 13th for security, and the November term was lost, he was denied security on account of such delay.⁹³

249. Rights of the defendant to security when he is in default.—Where the defendant is in default, he cannot move for security where the plaintiff upon a writ of inquiry would be entitled to nominal damages, and the defendant could not obtain costs;⁹⁴ and where he would not be entitled to costs in any event,—as

⁸⁷*Fitzsimmons v. Curley*, 18 Jones & S. 429, 6 N. Y. Civ. Proc. Rep. 156.

⁸⁸*Wolff v. Houston*, *W. Street & P. R. Co.* 16 N. Y. Civ. Proc. Rep. 107, 19 N. Y. S. R. 762, 2 N. Y. Supp. 789.

⁸⁹*Jaek v. Central Cross Town R. Co.* 28 N. Y. Week. Dig. 98; *Lewis v. Farrell*, 14 Jones & S. 358.

⁹⁰*Hall v. Templeton*, 3 N. Y. Week. Dig. 550.

⁹¹*Abell v. Bradner*, 15 N. Y. Civ. Proc. Rep. 241, 17 N. Y. S. R. 859, 3 N. Y. Supp. 20.

⁹²*Dunaway v. Terry*, 37 Misc. 510, 75 N. Y. Supp. 974.

⁹³*Carpenter v. Downing*, 6 Hill, 234.

⁹⁴*Butler v. Wood*, 10 How. Pr. 313.

where he has, by his pleadings, admitted that the plaintiff is entitled to such a judgment as would carry costs,—he cannot demand security for costs when he is in default.⁹⁵ In a proper case a defendant who is in default may require the plaintiff to file security for costs, if the order is obtained before a judgment is entered, because it is not certain but that the defendant may be entitled to costs, which would be the fact if the plaintiff recovered less than \$50.⁹⁶ But if the defendant is let in to defend after the default, and the judgment is allowed to stand as a security, he may require, as a matter of statutory right, security of the plaintiff.⁹⁷ If a judgment should be opened upon the merits the defendant may apply for security.⁹⁸

The discretion of the court in granting or refusing security for costs will not be reviewed by the court of appeals.⁹⁹

Where an order was granted upon insufficient affidavits, the plaintiff should move to vacate the order upon the papers upon which it was granted. If he moves to open it on affidavits, the defendant may meet the alleged deficiency by new affidavits.¹⁰⁰

250. How nonresidence is proved.—Whether a plaintiff is a nonresident is determined by the ordinary rules of evidence.¹⁰¹ Upon the return of an order to show cause why the plaintiff should not give security and he undertakes to show that he is a resident, it rests with him to show everything possible to support such a contention, and he cannot object that the moving affidavits are not sufficient.¹⁰²

An allegation that the plaintiff is a resident of the city, county, and state of New York, is too vague, and upon a motion the

⁹⁵*Butler v. Wood*, 10 How. Pr. 313.

⁹⁶*Abbott v. Smith*, 8 How. Pr. 463. *Proc. Rep.* 398, 46 N. Y. S. R. 762,

⁹⁷*Gardner v. Kelly*, 2 Sandf. 632, 19 N. Y. Supp. 392.

1 N. Y. Code Rep. 120.

⁹⁸*Merchants' Bank v. Mills*, 3 E. D. N. Y. S. R. 99, 34 N. Y. Supp. 115; *Smith*, 210.

⁹⁹*Gedney v. Purdy*, 47 N. Y. 676. *Supp.* 1003; *Stephenson v. Hanson*,

¹⁰⁰*Flaherty v. Cary*, 25 App. Div. 4 N. Y. Civ. Proc. Rep. 104.
195, 49 N. Y. Supp. 303.

¹⁰²*Hand v. Shaw*, 13 Misc. 143, 68

Mitchell v. Dick, 8 Misc. 98, 28 N. Y.

plaintiff's attorney will be compelled to furnish the address of the plaintiff.¹⁰³ The affidavit of a clerk that he called at a certain place and inquired for the plaintiff, and was informed that the plaintiff formerly resided there, but had removed on a certain date to another state, is not sufficient evidence to support an order requiring security for costs.¹⁰⁴

251. What is nonresidence.— The statute requiring nonresidents to give security for costs does not apply to resident aliens, unless such residence is shown to be merely temporary.¹⁰⁵ A plaintiff who is a nonresident at the time of the commencement of the action is not excused from filing security, because he afterwards becomes a resident of the state. The law looks to the situation at the time of the commencement of the action.¹⁰⁶ If the plaintiff is a resident at the time of the commencement of the action he cannot be compelled to give security, until he has actually removed. The law contemplates an actual, not an intended, removal.¹⁰⁷ An order requiring security will not be vacated because, by a change of the law, security could not now be required.¹⁰⁸ A positive statement in the affidavit of the defendant's attorney that the plaintiff is not a resident, when made absolutely, and evidently from personal knowledge, is sufficient to sustain a judge's order requiring the plaintiff to give security.¹⁰⁹ By residence is meant legal residence, not domicile.¹¹⁰ A married man having his family fixed at one place and doing business at another is deemed to have his residence with his family, although he may have been absent such a length

¹⁰³*Havana City R. Co. v. Ceballos*, 25 Misc. 660, 56 N. Y. Supp. 360.

¹⁰⁷*Morten v. Domestic Teleg. Co.* 1 Abb. N. C. 290.

¹⁰⁴*Davidson v. Bose*, 57 App. Div. 212, 68 N. Y. Supp. 316; *McNeil v. Merriam*, 57 App. Div. 164, 68 N. Y. Supp. 165.

¹⁰⁸*Harrison v. Newman*, 14 Jones & S. 575; *Wiley v. Arnoux*, 60 How. Pr. 137.

¹⁰⁵*Norton v. Mackie*, 8 Hun, 520.

¹⁰⁰*Wicker v. Elmira Heights*, 42 App. Div. 426, 59 N. Y. Supp. 130.

¹⁰⁶*Ambler v. Ambler*, 8 Abb. Pr. 340; *Sims v. Bonner*, 28 Jones & S. 63, 16 N. Y. Supp. 800.

¹¹⁰*Flaherty v. Carp*, 25 App. Div. 195, 49 N. Y. Supp. 303.

of time that he might be proceeded against by attachment.¹¹¹ The question of security will be settled only on the question of residence. The fact that the plaintiff has personal property in the state, under the control of one of the defendants, is immaterial.¹¹²

252. Special rule for the city court of New York.—By § 3160 of the Code of Civil Procedure, §§ 3268 and 3269 do not apply to actions prosecuted in the New York city court. Section 3160 also provides that a plaintiff in an action in that court, who has an office for the regular transaction of business in person within the city of New York, is deemed a resident of that city within the meaning of §§ 3268 and 3269, even if he is not a resident of the state.¹¹³ The moving papers in this court must affirmatively show that the plaintiff has not such an office.¹¹⁴ But this provision does not apply to a foreign corporation having a place of business in said city;¹¹⁵ nor to an action commenced in any other court.¹¹⁶

253. Cases where nonresident need not give security.—In an action where there are two or more plaintiffs the defendant is not entitled to security for costs from one or more of them, unless he is entitled to demand security from all the plaintiffs.¹¹⁷ A nonresident who unites with a resident plaintiff who had brought

¹¹¹*Roberti v. Methodist Book Concern*, 1 Daly, 3. *maek*, 15 N. Y. Civ. Proc. Rep. 239, 18 N. Y. S. R. 287, 3 N. Y. Supp.

¹¹²*Churchman v. Merritt*, 50 Hun. 270, 19 N. Y. S. R. 171, 2 N. Y. Supp. 843, Reversing 15 N. Y. Civ. Proc. Rep. 245, 2 N. Y. Supp. 843. *214. Contra, Local Pub. Co. v. Post*, N. Y. Daily Reg., April 16, 1884.

¹¹³*Beebe v. Parker*, 16 N. Y. Civ. Proc. Rep. 320, 22 Abb. N. C. 445, 24 N. Y. S. R. 120, 4 N. Y. Supp. 97; *116Bolton v. Taylor*, 18 Abb. Pr. 385, 3 Robt. 647; *Gardner v. Kelly*, 2 Sandf. 632, 1 N. Y. Code Rep. 120; *Blossom v. Adams*, 7 N. Y. Legal Obs. 314, 2 N. Y. Code Rep. 59; *Hicks v. Payson*, 7 Abb. Pr. 326; *Phoenix v. Townshend*, 2 N. Y. Code Rep. 2.

¹¹⁴*Wyckoff v. Derlin*, 8 N. Y. Civ. Proc. Rep. 138, 2 How. Pr. N. S. 333; *Glass v. Place*, 5 Daly, 110. ¹¹⁷*Sims v. Bonner*, 21 N. Y. Civ. Proc. Rep. 355, 42 N. Y. S. R. 10, 16 N. Y. Supp. 800; *Ten Broeck v. Reynolds*, 13 How. Pr. 462; *Gillespie v. Pfister, Coleman & Cai*, 120, 3 Johns. Cas. 470.

¹¹⁵*Stephenson v. Hanson*, 4 N. Y. Civ. Proc. Rep. 104; *Gage v. Pretsch*, 12 Misc. 548, 67 N. Y. S. R. 875, 34 N. Y. Supp. 20. ¹¹⁶*F. A. Kennedy Co. v. McCor-*

an action for the same cause and had been defeated with costs cannot be compelled to give security, although the resident plaintiff has not paid the costs in the former action.¹¹⁸ A nonresident who brings an action in two capacities will not be compelled to give security, unless he should give security in both capacities.¹¹⁹ A nonresident landlord cannot be compelled to give security in summary proceedings under § 3279 of the Code of Civil Procedure.¹²⁰ Nor should security be required of a nonresident relator in habeas corpus proceedings;¹²¹ nor on appeal from judgment of one of the inferior courts.¹²² Where a nonresident has given security for costs and has appealed from an adverse judgment giving a bond, an action upon the bond given in the trial court should not be brought until the appeal is decided. If such an action is brought the plaintiff should move in the original action for an order staying the prosecution of the same until the decision of the appeal.¹²³

254. Effect of removal of plaintiff from the state.—A plaintiff who removes from the state before he recovers a judgment in his favor may be compelled to give security.¹²⁴ Under the Revised Statutes this was not required in replevin actions, upon the ground that the bond given in replevin was broad enough to cover costs.¹²⁵ But under the Code of Civil Procedure the bond given upon replevin will not cover costs, and the defendant is therefore entitled to security in replevin actions the same as in any other.¹²⁶ But where the plaintiff recovers a judgment, and then

¹¹⁸*Ten Broeck v. Reynolds*, 13 How. Pr. 462.

¹¹⁹*Crowell v. Bills*, 24 Misc. 411, 53 N. Y. Supp. 647.

¹²⁰*Haster v. Johnston*, 59 How. Pr. 432.

¹²¹*People ex rel. James v. Society for Prevention of Cruelty to Children*, 19 Misc. 677, 44 N. Y. Supp. 1100; *People ex rel. Barry v. Mercein*, 3 Hill. 399, 38 Am. Dec. 644; *People ex rel. Young v. Stout*, 10 Misc. 247, 31 N. Y. Supp. 421.

¹²²*Gardner v. Kelly*, 2 Sandf. 632, 1 N. Y. Code Rep. 120.

¹²³*Van Vleck v. Clark*, 38 Barb. 316, 24 How. Pr. 190.

¹²⁴*Lery v. Meirowitz*, 16 Misc. 284, 38 N. Y. Supp. 123; *Gelch v. Barnaby*, 7 Abb. Pr. 19, 1 Bosw. 657; *Morten v. Domestic Teleg. Co.* 1 Abb. N. C. 290.

¹²⁵*Rogers v. Hitchcock*, 9 Wend. 462.

¹²⁶*Gelch v. Barnaby*, 7 Abb. Pr. 19, 1 Bosw. 657.

removes from the state, the defendant cannot require security for costs until that judgment is reversed;¹²⁷ or where judgment is obtained by default, until the defendant has the default opened.¹²⁸

255. Effect of assignment of cause of action to a resident of the state.—Where a claim has been assigned by a nonresident to a resident of the state, in order that he may bring an action thereon, the assignee is a trustee of an express trust and may be required to give security, in the discretion of the court;¹²⁹ but where the plaintiff claims that he is the absolute owner of the cause of action, which is denied by the defendant, the plaintiff cannot be compelled to give security for costs, because the question of ownership is one of the issues to be determined upon the trial.¹³⁰ But where, after the defendant has moved for security, the cause of action is transferred, the plaintiff will be compelled to give security.¹³¹

256. Residence of a domestic corporation.—A domestic corporation is a person within the meaning of this title, and its residence is the county which is designated in its certificate of incorporation as its principal place of business.¹³²

257. Residence of a foreign corporation.—A foreign corporation is a nonresident.¹³³ A national bank is a foreign corporation, although it has its principal place of business within the jurisdiction of the court.¹³⁴ A foreign corporation suing in the

¹²⁷*Flint v. Van Deusen*, 24 Hun, 247, 67 N. Y. S. R. 419. 33 N. Y. 440, 12 N. Y. Week. Dig. 126. Supp. 417.

¹²⁸*Merchants' Bank v. Mills*, 3 E. D. Smith, 210.

¹²⁹*Fish v. Wing*, 1 N. Y. Civ. Proc. Rep. 231.

¹³⁰*Horton v. Shepherd*, 1 N. Y. Civ. Proc. Rep. 26.

¹³¹*McNamara v. Harris*, 4 N. Y. Civ. Proc. Rep. 76.

¹³²*C. E. Sherin Special Agency v. Seaman*, 49 App. Div. 33, 63 N. Y. Supp. 407; *Edward Thompson Co. v. Lobenthal*, 24 N. Y. Civ. Proc. Rep.

¹²⁵*Grant v. Crittenton*, 13 N. Y. Civ. Proc. Rep. 123; *Henderson & Co. v. McNally*, 33 App. Div. 132, 28 N. Y. Civ. Proc. Rep. 178, 6 N. Y. Anno. Cas. 166, 53 N. Y. Supp. 351; *National Exch. Bank v. Silliman*, 4 Abb. N. C. 224; *Bank of Michigan v. Jessup*, 19 Wend. 10; *Persoe & B. Paper Works v. Willett*, 14 Abb. Pr. 119.

¹³⁴*National Park Bank v. Gunst*, 1 Abb. N. C. 292; *Bowen v. First Nat' Bank*, 34 How. Pr. 409.

New York city court will be required to give security, although it has an office in the city of New York for the transaction of business. Such a corporation is not a person within the meaning of § 3160 of the Code of Civil Procedure.¹³⁵ A foreign government bringing an action in the courts of this state may be required to give security for costs the same as any other nonresident.¹³⁶

258. Security required of an infant.— A defendant has an absolute right to require security of an infant whose guardian *ad litem* has not given security for costs, as provided in §§ 459 and 469 of the Code of Civil Procedure.¹³⁷ The plaintiff may be relieved from filing security for costs, by obtaining an order to be allowed to sue as a poor person.¹³⁸ But such an order cannot be obtained *ex parte* after the action is commenced.¹³⁹ A guardian *ad litem* of an infant, appointed as provided in § 469 of the Code of Civil Procedure, cannot be required to file security, but he is responsible for the costs.¹⁴⁰ The papers, upon his appointment, should show his responsibility, and, where they fail to do this, security should be required.¹⁴¹ The judgment for costs should be awarded against the infant, but they may be collected

¹³⁵*Henry Huber Co. v. Warren*, 29 Misc. 588, 61 N. Y. Supp. 247; *F. A. Kennedy Co. v. McCormack*, 15 N. Y. Civ. Proc. Rep. 239, 18 N. Y. S. R. 287, 3 N. Y. Supp. 214; *Edward Thompson Co. v. Lobenthal*, 24 N. Y. Civ. Proc. Rep. 247, 67 N. Y. S. R. 419.

¹³⁶*Honduras v. Soto*, 112 N. Y. 310, 2 L. R. A. 642, 16 N. Y. Civ. Proc. Rep. 270, 8 Am. St. Rep. 744, 20 N. Y. S. R. 749, 19 N. E. 845; *Mexico v. Arrangois*, 3 Abb. Pr. 470.

¹³⁷*Lafrentz v. Mass*, 23 N. Y. Civ. Proc. Rep. 238, 26 N. Y. Supp. 739; *Healy v. Twenty-Third Street R. Co.* 1 N. Y. Civ. Proc. Rep. 15; *Mercedeth v. Forty-Second Street & G. Street R. Co.* 1 N. Y. Civ. Proc. Rep. 15, note; *Forty-Second Street & G. Street Ferry R. Co. v. Guntzer*, 4

Jones & S. 567; *Dwyer v. McLaughlin*, 27 Misc. 187, 57 N. Y. Supp. 406; *Kleinpeter v. Kleinpeter*, 2 N. Y. Civ. Proc. Rep. 21; *Nichols v. Cammann*, 2 N. Y. Civ. Proc. Rep. 375.

¹³⁸Code Civ. Proc. §§ 459, 469; *Murphy v. Manhattan Brass Co.* 28 *Jones & S.* 423, 44 N. Y. S. R. 834, 18 N. Y. Supp. 207; *Shearman v. Pope*, 106 N. Y. 664, 12 N. Y. Civ. Proc. Rep. 329, 27 N. Y. Week. Dig. 1, 8 N. Y. S. R. 710, 12 N. E. 713; *Irving v. Garrity*, 13 Abb. N. C. 182, 4 N. Y. Civ. Proc. Rep. 105.

¹³⁹*Conboy v. Ayres*, 25 Misc. 52, 53 N. Y. Supp. 1004.

¹⁴⁰*Steinburg v. Manhattan R. Co.* 14 *Jones & S.* 216; *Wice v. Commercial F. Ins. Co.* 8 Daly, 70.

¹⁴¹*McDonald v. Brass Goods Mfg. Co.* 2 Abb. N. C. 434.

of the guardian *ad litem* by execution, which may be issued as of right.¹⁴² It is not necessary first to issue an execution against the infant, though this is, perhaps, the better practice.¹⁴³ Where, pending an action, the plaintiff becomes of age and takes personal charge of the case, the guardian will not be compelled to pay costs in case of his defeat,¹⁴⁴ except where the order discharging the guardian retained his liability for the costs already accrued, in which case the costs to that extent may be enforced against him.¹⁴⁵

A guardian *ad litem* for an infant defendant is not liable for the costs of the action, unless specially charged therewith by the order of the court for personal misconduct. Code Civ. Proc. § 477.

259. Security required of executors. a. In general.—Under § 3271 of the Code of Civil Procedure security for costs may be ordered in the discretion of the court in any action brought by an executor or administrator.¹⁴⁶ Formerly, executors and administrators were only required to give security for costs when they had been guilty of bad faith or mismanagement in the commencement or prosecution of the action.¹⁴⁷ The court may now require security for costs of an executor, although no bad faith is claimed, if, in the judgment of the court, it is proper to do so for the protection of the defendant.¹⁴⁸ The application for

¹⁴² Code Civ. Proc. § 3249: *Grantman v. Thrall*, 31 How. Pr. 464; *Fagan v. Strong*, 19 N. Y. Civ. Proc. Rep. 88, 11 N. Y. Supp. 766; *Caccavo v. Rome*, W. & O. R. Co. 27 Jones & S. 129, 13 N. Y. Supp. 884; *Rutherford v. Madrid*, 77 Hun. 545, 60 N. Y. S. R. 391, 28 N. Y. Supp. 923.

¹⁴³ *Grantman v. Thrall*, 31 How. Pr. 464.

¹⁴⁴ *Sparmann v. Keim*, 6 Abb. N. C. 353.

¹⁴⁵ *Schoen v. Schlessinger*, 7 Abb. N. C. 399, 57 How. Pr. 490.

¹⁴⁶ *Flynn v. Tinney*, 60 N. Y. Supp. 791; *Darby v. Condit*, 1 Duer. 599, 11 N. Y. Legal Obs. 154; *Schmidt v. Eiseman*, 6 Misc. 264, 58 N. Y. S. R. 133, 26 N. Y. Supp. 766; *Dunne v. American Surety Co.* 29 N. Y. Civ.

¹⁴⁷ *Kimberly v. Stewart*, 22 How. Pr. 281.

¹⁴⁸ *Pfeifer v. Supreme Lodge of B. S. Bener. Soc.* 54 App. Div. 200, 66 N. Y. Supp. 604; *Tolman v. Syracuse B. & N. Y. R. Co.* 92 N. Y. 353, 17 N. Y. Week. Dig. 32.

security for costs is usually denied where the executor or administrator brings an action in good faith.¹⁴⁹ But if the complaint fails to state a cause of action the application will be granted.¹⁵⁰

The provisions of § 3271 of the Code of Civil Procedure do not apply to an action commenced by a decedent and revived by his administrator or executor.¹⁵¹ The costs in such an action are not a debt within the purview of § 2749 of the Code of Civil Procedure. If the action had been commenced by the executor, and judgment rendered against him, the costs would not have been a debt within the contemplation of § 2757, which provides for the sale of decedent's real estate for the payment of debts.¹⁵² The fact that the action was commenced by the decedent does not change the rule.¹⁵³ The enactment of § 3246 since the decision of the last case cited does not change this rule, so far as it applies to real estate, as appears from §§ 2756 and 2757, although such costs are considered a debt, to be paid out of the personal estate of the deceased.¹⁵⁴

Such costs should be paid before legacies, even though the estate is not large enough to pay the legacies in full.¹⁵⁵ Upon a motion by the executor to be substituted as a plaintiff in an action in which his testator was sole plaintiff, the objection cannot be urged that the executor should be stayed till the costs were paid which were directed to be paid by the testator, because this is not a proceeding within the meaning of § 779 of the Code of Civil Procedure. That objection can be urged after substitution, if the plaintiff proceeds in the action.¹⁵⁶

¹⁴⁹*Flynn v. Tinney*, 60 N. Y. Supp. N. Y. Supp. 131; *Sanford v. Granger*, 791. 12 Barb. 397; *Re Stowell*, 15 Misc.

¹⁵⁰*G. Machle v. Rosenberg*, 80 App. Div. 541, 80 N. Y. Supp. 705. ¹⁵¹*Wood v. Byington*, 2 Barb. Ch.

¹⁵²*Demchey v. McCloud*, 21 Misc. 387.

¹⁵³*Re Foley*, 39 App. Div. 248, 57 N. Y. Supp. 131.

¹⁵⁴*Re Casey*, 2 Silv. Sup. Ct. 585, 25 N. Y. S. R. 88, 6 N. Y. Supp. 608.

¹⁵⁵*Van Brocklin v. Van Brocklin*, 17 App. Div. 226, 45 N. Y. Supp. 541.

¹⁵⁶*Re Foley*, 39 App. Div. 248, 57

b. Insolvent estate.—The majority of the decisions hold that the fact that an estate is insolvent is not sufficient reason to compel the executor to give security, when the action is brought in good faith and upon a *prima facie* case.¹⁵⁷ The courts usually deny the application for security for costs where the cause of action constitutes the only asset, and to require the plaintiff to give such security would be equivalent to denying to him the right to have his rights determined by the court.¹⁵⁸ There are a few decisions which hold that the insolvency of an estate is sufficient to authorize the giving of security, but these are of very doubtful authority.¹⁵⁹ But if an action is brought in bad faith, security will be required.¹⁶⁰

c. Nonresident executors.—Nonresidence of an executor or an administrator is no reason for requiring security for costs.¹⁶¹ A nonresident executor who has been substituted as plaintiff in place of his testator, who had been required to give security for costs, will also be required under the provisions of § 3276 of the Code of Civil Procedure to give security.¹⁶²

¹⁵⁷*Rutherford v. Madrid*, 77 Hun. *S. Bench. Soc.* 54 App. Div. 200, 545, 60 N. Y. S. R. 391, 28 N. Y. 66 N. Y. Supp. 604; *Fish v. Wing*, 1 Supp. 923; *Caccaro v. Rome*, W. & N. Y. Civ. Proc. Rep. 231.
¹⁵⁸*O. R. Co.* 27 Jones & S. 129, 13 N. Y. ¹⁵⁹*McNeil v. Merriam*, 57 App. Div. Supp. 884; *Schmidt v. Eiseman*, 6 164, 9 N. Y. Anno. Cas. 382, 68 N. Y. Misc. 264, 58 N. Y. S. R. 133, 26 Supp. 165; *Dunne v. American Surety Co.* 29 N. Y. Civ. Proc. Rep. 59, N. Y. Supp. 766; *Tolman v. Syracuse* 58 N. Y. Supp. 140; *Flynn v. Tinney*, *case*, B. & N. Y. R. Co. 92 N. Y. 353, 58 N. Y. Supp. 791; *McDougal v. Wassiger v. Fennell*, 13 N. Y. Civ. 60 N. Y. Supp. 791; *McDougal v. Proc. Rep.* 286; *Ryan v. Potter*, 4 N. 60 N. Y. Supp. 791; *McDougal v. Y. Civ. Proc. Rep.* 80, 2 N. Y. Civ. 4 N. Y. Supp. 74; *Hall v. Waterbury, Proc. Rep.* (McCarty) 33; *Healy v.* 5 Abb. N. C. 356; *Pursley v. Rodgers, Twenty-Third Street R. Co.* 1 N. Y. 44 App. Div. 139, 61 N. Y. Supp. Civ. Proc. Rep. 15; *Podmore v. South* 1015; *Crowell v. Bills*, 24 Misc. 411, *Brooklyn Sav. Inst.* 27 Misc. 120, 57 53 N. Y. Supp. 647; *Carney v. Bernheimer*, 1 N. Y. Civ. Proc. Rep. 233, N. Y. Supp. 406; *Drago v. Kavanagh*, note; *Kimberly v. Stewart*, 22 How. 56 App. Div. 179, 67 N. Y. Supp. 622.
¹⁵⁸*Wassinger v. Fennell*, 13 N. Y. Pr. 281; *Podmore v. Seamen's Bank Civ. Proc. Rep.* 286; *Koch v. Keller*, *for Savings*, 30 Misc. 416, 62 N. Y. 2 Month. L. Bull. 97; *Lyons v. Cahill*, 12 N. Y. Civ. Proc. Rep. 72, Supp. 526; *Pelkey v. Saranac*, 67 App. Div. 337, 73 N. Y. Supp. 493.
¹⁵⁹*Murphy v. Travers*, 60 How. Pr. ¹⁶²*Tracy v. Dolan*, 31 App. Div. 24, 52 N. Y. Supp. 351.
¹⁶⁰*Pfeifer v. Supreme Lodge of B.*

d. Notice of application.—The order, like all other orders under § 3271 of the Code of Civil Procedure, is a court order and must be made upon notice.¹⁶³

e. Security on appeal.—Where an executor is required to give security for costs upon an appeal, security for past costs should not be required.¹⁶⁴

260. Security required of receivers.—A receiver will not be required to give security unless it appears that the plaintiff has no funds in his hands applicable to the payment of costs, and also that the action was brought in bad faith or heedlessly or without reasonable prospects of success.¹⁶⁵ The carelessness or negligence of a receiver in bringing an action upon a note for which the defendant holds a receipt is such mismanagement or bad faith on the part of the plaintiff that the defendant is entitled to security.¹⁶⁶ A nonresident receiver of a national bank, not situated in New York, who sues in a capacity not defined by § 3271 of the Code of Civil Procedure, should be required to give security for costs.¹⁶⁷ The plaintiff will not be compelled to give security in an action which he brings in his own right, although he erroneously entitles it as brought by him as receiver.¹⁶⁸

A general assignee for the benefit of creditors is not an official

¹⁶³*Swift v. Wheeler*, 46 Hun. 580, 13 N. Y. Civ. Proc. Rep. 343, 27 N. Y. Week. Dig. 512, 12 N. Y. S. R. 1143.

¹⁶⁴*Harding v. Field*, 84 Hun. 540, 65 N. Y. S. R. 875, 32 N. Y. Supp. 737; *McNeil v. Merriam*, 57 App. Div. 164, 9 N. Y. Anno. Cas. 382, 68 N. Y. Supp. 165; *Wood v. Blodgett*, 49 Hun. 64, 2 N. Y. Supp. 304; *Pursley v. Rodgers*, 44 App. Div. 139, 61 N. Y. Supp. 1015. *Contra*, *Dunne v. American Surety Co.* 29 N. Y. Civ. Proc. Rep. 59, 58 N. Y. Supp. 140.

This case is a special term decision in the first department, and is directly opposed to the *obiter* remark of the appellate division in that department in *Pursley v. Rodgers*, 44 App. Div. 139, 61 N. Y. Supp. 1015.

¹⁶⁵*Ridgway v. Symons*, 14 Misc. 78, 25 N. Y. Civ. Proc. Rep. 23, 69 N. Y. S. R. 552, 35 N. Y. Supp. 197; *Bennett v. Goble*, 43 Hun. 354; *Rutherford v. Madrid*, 77 Hun. 545, 28 N. Y. Supp. 923; *Hale v. Mason*, 86 Hun. 499, 33 N. Y. Supp. 789.

¹⁶⁶*Kimberly v. Goodrich*, 22 How. Pr. 424.

¹⁶⁷*Beckham v. Hague*, 44 App. Div. 146, 60 N. Y. Supp. 767.

¹⁶⁸*Upson v. Hesselson*, 60 App. Div. 615, 69 N. Y. Supp. 684.

assignee within the meaning of § 3268 of the Code of Civil Procedure. An official assignee is one appointed by the court, and has certain duties imposed upon him by the court.¹⁶⁹ Such an assignee is a trustee of an express trust within the meaning of § 3271 of the Code of Civil Procedure, and security may be demanded of him in the discretion of the court.¹⁷⁰

261. Security required of receivers in supplementary proceedings.—A receiver in supplementary proceedings may be required to give security for costs.¹⁷¹ A receiver should apply to the court that appointed him, for leave to bring suit.¹⁷² Even then the court can order him to give security.¹⁷³ In an action to set aside a deed, where the receiver has no funds in his hands the court will usually order security to be given, because the judgment creditor can bring the action himself, and the court will not allow him to put the defendant to the expense of defending his title for the benefit of a creditor who, in case of a defeat, cannot be made to pay the costs.¹⁷⁴

262. When trustees in bankruptcy are required to give security for costs.—A trustee in bankruptcy is a trustee of an express trust, and may be compelled to give security for costs.¹⁷⁵ But he will not be compelled to file security for costs on the ground that there are no funds in his hands to pay expenses.¹⁷⁶

Where a trustee in bankruptcy brings an action upon a claim arising before the adjudication in bankruptcy, the defendant

¹⁶⁹*Lintner v. Long Island Mut. F. Ins. Co.* 22 Misc. 305, 5 N. Y. Anno. Cas. 281, 49 N. Y. Supp. 1105; *Fish v. Wing*, 1 N. Y. Civ. Proc. Rep. 231. *Contra, Welch v. Gaffney*, 1 How. Pr. N. S. 146.

¹⁷⁰*Ranney v. Stringer*, 4 Bosw. 663. ¹⁷¹*Gifford v. Rising*, 48 Hun, 128. 14 N. Y. Civ. Proc. Rep. 172, 28 N. Y. Week. Dig. 327, 15 N. Y. S. R. 596.

¹⁷²*Bolles v. Duff*, 17 Abb. Pr. 448; *Welch v. Bogert*, 3 N. Y. Week. Dig. 402.

¹⁷³*Welch v. Bogert*, 3 N. Y. Week. Dig. 402.

¹⁷⁴*Welch v. Bogert*, 3 N. Y. Week. Dig. 402.

¹⁷⁵*More v. Durr*, 13 Jones & S. 154; *Hall v. Waterbury*, 5 Abb. N. C. 356; *Reade v. Waterhouse*, 52 N. Y. 587; *Todd v. Marsily*, 26 N. Y. Week. Dig. 244, 7 N. Y. S. R. 872.

¹⁷⁶*Wilbur v. White*, 56 How. Pr. 321.

is entitled, under § 3268 of the Code of Civil Procedure, to an order requiring him to give security for costs.¹⁷⁷

But a trustee in bankruptcy will not be required to give security for costs under that section, where he brings an action to set aside, as fraudulent, conveyances made by the bankrupt, on the ground that such conveyances constituted an unlawful preference to creditors, in violation of the provisions of the bankruptcy law. In such a case the cause of action did not arise till the adjudication in bankruptcy.¹⁷⁸ If a creditor could have brought an action to set aside a transfer before the adjudication of bankruptcy, and the trustee brings an action to set aside the transfer, on the same grounds upon which the creditor could have maintained his action, security can be demanded under §3268 of the Code of Civil Procedure.

¹⁷⁷*Frank v. Musliner*, 29 Misc. 237, 60 N. Y. Supp. 332; *Welch v. Gaffney*, 1 How. Pr. N. S. 146; *Joseph v. Raff*, 75 App. Div. 447, 78 N. Y. Supp. 310, Overruling *Joseph v. Makley*, 73 App. Div. 157, 76 N. Y. Supp. 669. ¹⁷⁸*Kelley v. Kremer*, 74 App. Div. 456, 77 N. Y. Supp. 515; *Schreier v. Hogan*, 70 App. Div. 2, 74 N. Y. Supp. 1051; *Rielly v. Rosenberg*, 57 App. Div. 408, 68 N. Y. Supp. 265.

CHAPTER XXIII.

COSTS IN ACTIONS IN FORMA PAUPERIS.

- 263. Statute.
- 264. Who may apply for leave to sue as a poor person.
 - a. Nonresidents.
 - b. Infants.
 - c. Other persons.
- 265. Who is a pauper.
- 266. When the application should be made.
- 267. What the petition must state.
- 268. Right to be thus allowed to sue, lost by laches.
- 269. Designation and duties of attorney assigned to conduct an action for a poor person.
- 270. Stay for nonpayment of costs that have accrued at the time of granting the order.
- 271. Effect of order allowing a party to sue as a poor person.
- 272. Terms upon opening a default.
- 273. Power of the court to impose the payment of costs as condition of granting a favor.

263. Statute.—The statute governing the rights of persons to be allowed to prosecute or defend certain actions as poor persons is contained in § 458–467 of the Code of Civil Procedure.

264. Who may apply for leave to sue as a poor person. *a. Nonresidents.*—The weight of authority is that a nonresident may be allowed to sue as a poor person.¹ But where the cause of action arose in another state, where both parties reside, the motion will be denied,—especially where there has been a long delay in making the application.²

b. Infants.—Prior to 1891 there was a conflict of authority

¹*Heckman v. Mackey*, 19 Abb. N. Y. S. R. 599, 13 N. Y. Supp. 718. C. 394, 13 N. Y. Civ. Proc. Rep. 11; *Contra, Christian v. Gouge*, 58 How. *Harris v. Mutual L. Ins. Co.* 18 N. Y. Pr. 445, 10 Abb. N. C. 82; *Anony-* Civ. Proc. Rep. 195, 10 N. Y. Supp. *mous*, 10 Abb. N. C. 80; *Moore v.* 473; *Harris v. Mutual L. Ins. Co. Cooley*, 2 Hill, 412.

20 N. Y. Civ. Proc. Rep. 192, 37 N. ²*Alexander v. Meyers*, 8 Daly, 112.

as to the right of an infant to sue as a poor person. Since the amendment to § 458 of the Code of Civil Procedure by the insertion of the words "whether an adult or infant," and by the amendment to § 459 at the same time, infants have a right to thus sue,³ although the guardian has not given security for costs.⁴ An infant may thus sue, although his guardian *ad litem* is a responsible person.⁵ An infant may be allowed to sue as a poor person, although his father has ample means,⁶ and has been appointed guardian *ad litem* of the plaintiff.⁷ The application to sue *in forma pauperis* must be made in the action in which the guardian *ad litem* was appointed. After a verdict in that action the guardian's authority is at an end, except to review that judgment by appeal. He has no authority to institute another action.⁸

c. Other persons.—The committee of a lunatic cannot sue as a poor person.⁹ A husband or wife may be permitted to commence an action for separation *in forma pauperis*.¹⁰ All the parties plaintiff must apply for leave to sue *in forma pauperis*, and the order must be granted to all. Permission to thus sue cannot be granted to only one of several plaintiffs.¹¹

265. Who is a pauper.—It is not every person who is not worth \$100 that is entitled to the order, but it must appear that the person would be unable to prosecute his action without this

³*Irving v. Garrity*, 13 Abb. N. C. 144, 23 N. Y. Civ. Proc. 182; *Hotelling v. McKenzie*, 7 N. Y. Rep. 365, 58 N. Y. S. R. 479, 27 N. Y. Civ. Proc. Rep. 320; *Tobias v. Broadway & S. Ave. R. Co.* 39 N. Y. S. R. 183, 14 N. Y. Supp. 641; *Erickson v. Pocy*, 5 N. Y. Civ. Proc. Rep. 379.

⁴*Trimble v. Kilgannon*, 12 Misc. 459, 24 N. Y. Civ. Proc. Rep. 400, 68 N. Y. S. R. 134, 34 N. Y. Supp. 256.

⁵*Feier v. Third Ave. R. Co.* 9 App. Div. 607, 75 N. Y. S. R. 1222, 41 N. Y. Supp. 821.

⁶*Bonadua v. Third Ave. R. Co.* 62 N. Y. S. R. 120, 30 N. Y. Supp. 410.

⁷*Shapiro v. Burns*, 7 Misc. 418, 31

Abb. N. C. 144, 23 N. Y. Civ. Proc. 182; *Hotelling v. McKenzie*, 7 N. Y. Rep. 365, 58 N. Y. S. R. 479, 27 N. Y. Civ. Proc. Rep. 320; *Tobias v. Broadway & S. Ave. R. Co.* 39 N. Y. S. R. 183, 14 N. Y. Supp. 641; *Erickson v. Pocy*, 5 N. Y. Civ. Proc. Rep. 379.

⁸*Rosso v. Second Ave. R. Co.* 13 App. Div. 375, 43 N. Y. Supp. 216.

⁹*Bechtel v. Manhattan R. Co.* 31 Abb. N. C. 483, 62 N. Y. S. R. 120, 30 N. Y. Supp. 410.

¹⁰*McAllen's Petition*, 1 Month. L. Bull. 60; *Robertson v. Robertson*, 3 Paige, 387.

¹¹*Ostrander v. Harper*, 14 How. Pr. 16.

order¹² A person need not be a pauper to be allowed to sue as a poor person. It is sufficient if the plaintiff is not worth \$100 besides wearing apparel.¹³ The law does not deny its aid even to paupers, and the order should be granted, where a denial would be equivalent to a denial of the protection of the court.¹⁴

266. When the application should be made.—The application to be allowed to sue as a poor person should be made at, or soon after, the commencement of the action.¹⁵ An infant cannot make application for leave to defend as a poor person, until a guardian *ad litem* has been appointed.¹⁶ It is a disputed question whether this right may be lost by laches,¹⁷ or whether it is an absolute right of the plaintiff upon complying with the statutory requirements at any time during the action.¹⁸ The latter position is more consonant with reason and the statute than the former. See § 268, *infra*. It has also been held that the granting of the order rests in the discretion of the court, which will not be disturbed upon appeal unless there has been an abuse of such discretion.¹⁹

267. What the petition must state.—Section 459 of the Code of Civil Procedure: "The petition must state: 1. The nature of the action brought, or intended to be brought. 2. That the applicant is not worth \$100, besides the wearing apparel and furniture necessary for himself and his family, and the subject-matter of the action. It must be verified by the applicant's affidavit, unless the applicant is an infant under the age of four-

¹²*Gallerstein v. Manhattan R. Co.* 26 Misc. 853, 55 N. Y. Supp. 444; ¹⁶*Re Byrne*, 1 Edw. Ch. 41.
¹³*Weinstein v. Frank*, 56 App. Div. 275, 67 N. Y. Supp. 746. ¹⁷*Sweeney v. White*, 10 Misc. 29, 63 N. Y. S. R. 242, 30 N. Y. Supp. 1051; *Glasburg v. Dry Dock, E. B. & B. R. Co.* 12 N. Y. Civ. Proc. Rep. 50.
¹⁴*MeNamara v. Nolan*, 13 Misc. 76, 25 N. Y. Civ. Proc. Rep. 35, 68 N. Y. S. R. 229, 34 N. Y. Supp. 178. ¹⁸*Shapiro v. Burns*, 7 Misc. 418, 31 Abb. N. C. 144, 23 N. Y. Civ. Proc. Rep. 365, 58 N. Y. S. R. 479, 27 N. Y. Supp. 980; *Kahn v. Singer Mfg. Co.* 63 N. Y. S. R. 242, 30 N. Y. Supp. 1051; *Ostrander v. Harper*, 14 How. Pr. 16. ¹⁹*Steinberg v. Rosenthal*, 17 Misc. 53, 39 N. Y. Supp. 1132.

teen years, and in that case by the affidavit of his guardian appointed in said action, and supported by a certificate of a counselor at law, to the effect that he has examined the case, and is of the opinion that the applicant has a good cause of action."

Section 464 of the Code of Civil Procedure: "The petition must contain the same matters, respecting the ability of the petitioner, required to be contained in a petition for leave to prosecute as a poor person; and it must be supported by a similar certificate, relating to the defense."

A petition upon an application to be allowed to sue as a poor person, which alleges the facts upon which the action is to be based, and the poverty of the petitioner, makes a *prima facie* case for the granting of the order.²⁰ An application by an administrator for leave to sue as a poor person must show the financial condition of the estate; merely showing the poverty of the petitioner is not sufficient.²¹ The plaintiff must satisfy the court that he has a good cause of action. This is not done by setting forth in general terms in the complaint and the petition the cause of action, upon information and belief, without giving the sources of his information and the grounds of his belief, when the defendant produces affidavits of eye-witnesses, which show that the plaintiff cannot recover.²²

Upon his application the plaintiff need not go into the merits of the case, nor prove his right to recover.²³ The truth of the facts alleged in the petition and the sufficiency of the plaintiff's cause of action can be controverted by affidavits only. The answer cannot be used as an opposing affidavit, because that creates the issues merely.²⁴ The plaintiff sufficiently states the nature

²⁰*Young v. Nassau Electric R. Co.* 34 App. Div. 126, 54 N. Y. Supp. 600. ²³*Kahn v. Singer Mfg. Co.* 18 Misc. 568, 42 N. Y. Supp. 461; *McNamara v. Nolan*, 13 Misc. 76, 25 N. Y. Civ. Proc. Rep. 35, 68 N. Y. S. R. 229.

²¹*Daus v. Nussberger*, 25 App. Div. 185, 49 N. Y. Supp. 291. ²²*Saltzman v. Northrop*, 18 Misc. 34 N. Y. Supp. 178.

²³*353, 41 N. Y. Supp. 547; Beyer v. Clark*, 29 Abb. N. C. 338, 22 N. Y. Supp. 540. ²⁴*Kahn v. Singer Mfg. Co.* 18 Misc. 568, 42 N. Y. Supp. 461; *Beyer v. Clark*, 29 Abb. N. C. 338, 22 N. Y. Supp. 540.

of the action by a reference to the complaint, which has already been served.²⁵ When the defendant has moved for security for costs and the plaintiff makes a motion to be allowed to sue as a poor person, the granting of the plaintiff's motion is a denial of the defendant's by which he is bound, unless he appeals.²⁶ If the defendant has obtained an order compelling the plaintiff to give security for costs, the plaintiff can make a motion to vacate that motion and to be allowed to sue as a poor person.²⁷ But a judge who has granted an order *ex parte*, allowing the plaintiff to sue as a poor person, cannot set aside such an order, unless it is made to appear that some material fact was misstated, or some fact has been suppressed which, if brought to the attention of the court, would have required the judge to refuse such application.²⁸ The fact that the plaintiff has been defeated in a former action upon the same cause is properly considered by the court upon the question whether the plaintiff has a meritorious cause of action, but the fact of the adverse decision of the former case is not a bar to the application for leave to sue as a poor person.²⁹

268. Right to be thus allowed to sue, lost by laches.—In those courts where it is held that the right to sue *in forma pauperis* may be lost by laches, it has been held that a motion for leave to prosecute as a poor person, where there has been unreasonable delay in making the application, has been denied for laches under the following conditions: Where the application was not made till one year after the joinder of issue;³⁰ where the application was not made till three years after the joinder of issue;³¹

Supp. 540; *McGillicuddy v. Kings County Elev. R. Co.* 10 Misc. 21, 62 N. Y. S. R. 648, 30 N. Y. Supp. 833.

²⁵*McGillicuddy v. Kings County Elev. R. Co.* 10 Misc. 21, 62 N. Y. S. R. 648, 30 N. Y. Supp. 833.

²⁶*Hays v. Knickerbocker Ice Co.* 20 N. Y. Week. Dig. 61.

²⁷*Shapiro v. Burns*, 7 Misc. 418, 31 Abb. N. C. 144, 23 N. Y. Civ. Proc.

Rep. 365, 58 N. Y. S. R. 479, 27 N. Y. Supp. 980.

²⁸*Rosa v. Second Ave. R. Co.* 20 App. Div. 334, 46 N. Y. Supp. 807.

²⁹*Young v. Nassau Electric R. Co.* 34 App. Div. 126, 54 N. Y. Supp. 600.

³⁰*Alexander v. Meyers*, 8 Daly, 112.

³¹*Sweeney v. White*, 10 Misc. 29, 63 N. Y. S. R. 242, 30 N. Y. Supp. 1051.

and where the case had been referred and noticed for trial.³² The application of an infant by his guardian *ad litem*, who has been ordered to give security for costs, and the trial actually commenced, will be denied for laches.³³

If the plaintiff neglects to serve a copy of the order, he must present it to the clerk upon the taxation of costs; otherwise, he will lose all his rights under the order.³⁴

A person suing *in forma pauperis* may appeal from the judgment or order, but he will be liable for the costs of the appeal if he is beaten, because the immunity from costs does not apply to the costs of an appeal unless the person suing *in forma pauperis* is the respondent.³⁵

269. Designation and duties of attorney assigned to conduct an action for a poor person.—The order should contain the name of the counsel who is assigned as required by § 460 of the Code of Civil Procedure, and also the provision that he should serve without compensation.³⁶ If the order does not contain this provision it is fatally defective.³⁷

The court is not required to assign an attorney designated by the party,³⁸ and should assign an attorney who makes application to be the attorney in the action only in exceptional cases, and then only when it clearly appears that the party knows that the attorney is bound to act without compensation, and the attorney agrees to so act.³⁹ An agreement whereby the attorney

³²*Florence v. Bulkley*, 1 Duer, 705, 273; *Ostrander v. Harper*, 14 How. Pr. 16; *Moore v. Cooley*, 2 Hill, 412;

³³*Glasberg v. Dry Dock E. B. & B. Co.* 12 N. Y. Civ. Proc. Rep. 50. *McDonald v. Bank for Savings*, 2 How. Pr. 35. *Contra, Whelan v. Whelan*, 3 Cow. 537.

³⁴*Neugrosche v. Manhattan R. Co.* 1 N. Y. S. R. 302; *Oakes v. High*, 11 Misc. 313, 65 N. Y. S. R. 497, 32 N. Y. Supp. 289; *Johnston v. Green*, 3 Abb. Pr. N. S. 342.

³⁵*Hayden v. Hayden*, 8 App. Div. 547, 40 N. Y. Supp. 865; *Morse v. Troy*, 38 Hun, 301; Code Civ. Proc. § 466; *Lyons v. Murat*, 54 How. Pr. 24, 363; *Bolton v. Gardner*, 3 Paige,

³⁶*Daus v. Nussberger*, 25 App. Div. 185, 49 N. Y. Supp. 291.

³⁷*Rutkowsky v. Cohen*, 74 App. Div. 415, 77 N. Y. Supp. 546.

³⁸*Helmprecht v. Bowen*, 87 Hun, 362, 34 N. Y. Supp. 1141.

³⁹*Harris v. Mutual L. Ins. Co.* 20 N. Y. Civ. Proc. Rep. 192, 37 N. Y. S. R. 599, 13 N. Y. Supp. 718; *Cahill*

is to receive a part of the recovery is fatal to the application.⁴⁰ The attorney is, however, entitled to any costs awarded in the action, subject to the power of the court to distribute them.⁴¹ If he retains anything beyond that, his client may compel him to pay it over.⁴² When the plaintiff suing as a poor person recovers a judgment which does not carry costs, he can enter a judgment for the amount of the recovery without the addition of any costs.⁴³ The motion for leave to sue as a poor person will be denied where it appears that the attorney has agreed to conduct the case without expense to the plaintiff, because then the plaintiff does not need statutory assistance in defraying the expenses of the litigation.⁴⁴

270. Stay for nonpayment of costs that have accrued at the time of granting the order.— Liability for costs in a former suit did not prevent the plaintiff from obtaining the order under the Revised Statutes,⁴⁵ nor under § 461 of the Code of Civil Procedure.⁴⁶ But such an order does not relieve him from paying costs that have already accrued in this action, and he would be stayed for the nonpayment thereof, the same as in any other case.⁴⁷

271. Effect of order allowing a party to sue as a poor person.— Sec. 461 of the Code of Civil Procedure: "A person so admitted may prosecute his action without paying fees to any officer; and he shall not be prevented from prosecuting the same, by reason of his being liable for the costs of a former action brought by him against the same defendant. If judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him."

v. Manhattan R. Co. 38 App. Div. 314, 57 N. Y. Supp. 10. *"Downs v. Farley,* 18 Abb. N. C. 464, 12 N. Y. Civ. Proc. Rep. 119.

⁴⁰*Cahill v. Manhattan R. Co.* 38 App. Div. 314, 57 N. Y. Supp. 10; 466. ⁴¹*Roberti v. Carlton,* 18 How. Pr.

Joyce v. Cooper, 17 Jones & S. 115. ⁴²*Rosa v. Second Ave. R. Co.* 20

⁴³Code Civ. Proc. § 467. App. Div. 334, 46 N. Y. Supp. 807.

⁴⁴*Re Kelly,* 12 Daly, 110. ⁴⁵*Lyons v. Murat,* 54 How. Pr. 24.

⁴⁶*Weltman v. Posenecker,* 19 Misc. 363; *Brown v. Story,* 1 Paige, 583. 592, 44 N. Y. Supp. 406.

272. Terms upon opening a default.— Where a person suing *in forma pauperis* allows his complaint to be dismissed by default the case will not be restored until the plaintiff pays costs of the trial, and motion costs, \$40.⁴⁸

273. Power of the court to impose the payment of costs as condition of granting a favor.— The court can impose costs upon a party suing *in forma pauperis*, as a condition of granting a favor,—such as allowing an amendment to the complaint after a reversal by the appellate court of a judgment in favor of the plaintiff. This may be imposed, although the costs, as taxed, and which the plaintiff is directed to pay as a condition of amending his complaint, are larger than the judgment reversed.⁴⁹ The court may also impose terms upon allowing the plaintiff to discontinue after he has been allowed to sue as a poor person.⁵⁰ He may also be charged with costs incurred in setting aside his proceedings for irregularity, or for a contempt, or for striking out scandalous or impertinent matter.⁵¹

⁴⁸*Elwin v. Routh*, 1 N. Y. Civ. Proc. Rep. 131; *Neugrosche v. Manhattan R. Co.* 1 N. Y. S. R. 302. ⁵⁰*Parkinson v. Scott*, 5 Misc. 261, 25 N. Y. Supp. 102, 31 Abb. N. C. 44.

⁵¹*Richardson v. Richardson*, 5 Misc. 345, 43 N. Y. Supp. 499.

CHAPTER XXIV.

ADDITIONAL ALLOWANCES.

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274. Statute.— The statute governing these allowances is contained in §§ 3253 and 3254 of the Code of Civil Procedure.

Sec. 3253: "In an action brought to foreclose a mortgage upon

real property, or for the partition of real property, or in a difficult and extraordinary case (where a defense has been interposed, in an action); or, except in the first and second judicial districts, in a special proceeding by certiorari to review an assessment, under article 11 of chapter 908 of the Laws of 1896, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

“1. In an action to foreclose a mortgage, a sum not exceeding $2\frac{1}{2}$ per cent upon the sum due or claimed to be due upon the mortgage, nor the aggregate sum of \$200.

“2. In any action or special proceeding specified in this section where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding 5 per cent upon the sum recovered or claimed, or the value of the subject-matter involved.”

Sec. 3254: “But all the sums awarded to the plaintiff, as prescribed in § 3252 of this act, or to a party, or two or more parties on the same side, as prescribed in the last sentence of § 3251 of this act, and in subdivision 2 of the last section, cannot exceed, in the aggregate, \$2,000.”

Rule 45 of the General Rules of Practice provides that the “applications for an additional allowance can only be made to the court before which the trial is had, or the judgment rendered, and shall in all cases be made before final costs are adjusted.”

It will be seen that an allowance may be made under this section in three classes of actions.

1. In an action brought to foreclose a mortgage upon real property.

2. In an action for the partition of real property.

3. In any difficult and extraordinary case, where a defense has been interposed.

275. In general.—It is the policy of the law in granting an additional allowance, to prevent them from being inflicted by way of penalties upon parties in needy or even moderate circum-

stances. This would close the doors of the courts to many of this class of people, because the risk of being made to pay such an allowance would deter many from bringing an action on what they considered a good cause of action. To people of affluent circumstances this is of little consequence, but to the others, who are much the larger class, it is not only discouraging, but also impoverishing.¹ The question of whether an additional allowance will be granted or not, and, if granted, how much, will be decided on the facts of each case. The amount will be what would be a moderate counsel fee for that case. Some courts have refused to grant it for the purpose of paying counsel fees to lawyers from abroad.² It is given for the trouble incurred in the trial of an action, and not for appeals.³ The court in exercising its discretion will take into account the fact that the defeated party has been compelled to pay more than the ordinary costs,—as, where two defendants in good faith severed their defense;⁴ or that the granting of an allowance will be to practically compel a third person to pay it,—as in case of granting an additional allowance against an insolvent savings bank.⁵

An allowance cannot be made upon the stipulation that it will be waived if the defeated party does not take an appeal, because that is practically a fine of that amount, imposed upon the defeated party for appealing from the judgment.⁶

276. When the application for an additional allowance should be made.—Application for an additional allowance must be

¹*Van Brunt v. Van Brunt*, 14 N. Y. S. R. 887.

⁴*Tillman v. Powell*, 13 How. Pr. 117; *Matthewson v. Thompson*, 9 How. Pr. 231.

²*Schwartz v. Poughkeepsie Mut. F. Ins. Co.* 10 How. Pr. 93.

⁵*Hurd v. Farmers' Loan & T. Co.* 16 N. Y. Week. Dig. 480; *Kelly v. Chenango Valley Sav. Bank*, 45 N. Y. Supp. 658.

³*Monnet v. Merz*, 30 Abb. N. C. 281, 54 N. Y. S. R. 322, 24 N. Y. Supp. 485; *Wolfe v. Van Nostrand*, 2 N. Y. 570; *Eldridge v. Strenz*, 7 Jones & S. 295; *Parrott v. Sawyer*, 26 Hun, 466; *People v. New York C. R. Co.* 29 N. Y. 418, Further Appeal, 30 How. Pr. 148.

⁶*Thames Loan & T. Co. v. Hagemeyer*, 38 App. Div. 449, 56 N. Y. Supp. 689.

made before the entry of final judgment,⁷ except in partition actions, when the application should not be made until after the entry of final judgment.⁸ It is usually made at the close of the trial, and, when granted, the additional allowance is included in the bill of costs and inserted as a part of the judgment.⁹ If not made at that time, it must be made on notice. Upon such motions it is not usual to hear affidavits of counsel.¹⁰

The court may, when the verdict is rendered grant an additional allowance to the successful party, although the attorney for the defeated party is not in court at the time.¹¹ Where the judge at the trial takes the question of such an allowance under consideration, and does not make his decision thereon till the attorney for the defeated party, and one of his clients, are dead, the court will not disturb the allowance granted and entered in ignorance of such deaths.¹² On a motion properly noticed for final judgment in a foreclosure action the court may grant the moving party a further allowance.¹³ But an order in such an action, made before a reference to compute the amount due has been had, directing that the plaintiff have an additional allowance, without further notice upon the coming in of the referee's report, is unauthorized and should be reversed.¹⁴ In equity cases it is usual to allow or disallow an additional allowance in

⁷General Rules of Practice, 45; 3 N. Y. Code Rep. 192; *Howe v. Williams v. Western U. Tel. Co.* Muir, 4 How. Pr. 252. 3 N. Y. Code 61 How. Pr. 305; *Martin v. McCor-mack*, 3 Sandf. 755, N. Y. Code Rep. N. S. 214; *Clarke v. Rochester*, 29 How. Pr. 97; *Beals v. Benjamin*, 29 How. Pr. 101.

⁸*Winne v. Fanning*, 19 Misc. 410, 44 N. Y. Supp. 262; *Saffron v. Saffron*, 11 N. Y. S. R. 471.

⁹*People v. New York C. R. Co.* 29 N. Y. 418, Further Appeal, 30 How. Pr. 148.

¹⁰*Mitchell v. Hall*, 7 How. Pr. 490; *Mann v. Tyler*, 6 How. Pr. 235. N. Y. Code Rep. N. S. 382; *Saratoga & W. R. Co. v. McCoy*, 9 How. Pr. 339; *Niver v. Rossman*, 5 How. Pr. 153,

¹¹*Gillespy v. Bilbrough*, 15 App. Div. 212, 44 N. Y. Supp. 260; *Mitchell v. Hall*, 7 How. Pr. 490; *Van Rensselaer v. Kidd*, 5 How. Pr. 242, 3 N. Y. Code Rep. 294.

¹²*Arthur v. Schriever*, 28 Jones & S. 59, 16 N. Y. Supp. 610.

¹³*Walsh v. Weidenfeld*, 3 Daly. 334.

¹⁴*Citizens' Sav. Bank v. Bauer*, 49 Hun. 238, 14 N. Y. Civ. Proc. Rep. 340, 28 N. Y. Week. Dig. 541, 17 N. Y. S. R. 81, 1 N. Y. Supp. 450.

the conclusions of law.¹⁵ An application for an additional allowance, made after final costs have been adjusted, but before the adjustment of other costs awarded upon an application to open a default, is made too late.¹⁶ A long delay in moving for an additional allowance will be deemed a waiver of the right to such an allowance.¹⁷

The court has power to set aside a taxation of costs, so that an application for an additional allowance can be made before the taxation of costs, when it is alleged that costs were taxed inadvertently;¹⁸ or where the successful party taxed his costs under the impression that he was entitled to the additional allowance granted on a former trial, and, upon the discovery of his mistake, moved to set aside the taxation.¹⁹ But where the plaintiff deliberately taxed, by consent 5 per cent of his recovery as an additional allowance, the court will not set aside the taxation of costs, so that he may make an application for an allowance upon the counterclaim which he defeated. He has made his election and must abide by it.²⁰ Where a party desires a reargument in the appellate court after judgment absolute has been entered upon the remittitur, and the new remittitur is sent to the appellate court and again returned to the court of original jurisdiction, the prevailing party, before again entering judgment, may make a motion for an additional allowance.²¹

277. Defense must be interposed.— There can be no allowance under § 3253 of the Code of Civil Procedure, unless a defense has been interposed in the action.²² This was so under the Code

¹⁵*Gurney v. Union Transfer & Storage Co.* 25 Jones & S. 444, 29 N. Y. S. R. 274, 8 N. Y. Supp. 549.

¹⁶*Jones v. Wakefield.* 21 N. Y. Week. Dig. 287.

¹⁷*Commissioners of Pilots v. Spoford.* 49 How. Pr. 28.

¹⁸*Dietz v. Farish.* 11 Jones & S. 87.

¹⁹*Thompson v. St. Nicholas Nat. Bank.* 54 Hun. 393, 27 N. Y. S. R. 450.

186. 7 N. Y. Supp. 491.

²⁰*Mattheus v. Matson.* 3 N. Y. Civ. Proc. Rep. 157.

²¹*Trimm v. Marsh.* 2 Hun. 383, 4

²²*Krum v. Steele.* 7 N. Y. Week.

Dig. 472; *Citizens' Sav. Bank v.*

Bauer. 49 Hun. 238, 14 N. Y. Civ.

Proc. Rep. 340, 28 N. Y. Week. Dig.

541, 17 N. Y. S. R. 81, 1 N. Y. Supp.

of Procedure.²³ Prior to the amendment of the Code of Procedure by chap. 615 of the Laws of 1865, an allowance could be granted by the court in difficult and extraordinary cases, only where a trial had been had. Code Proc. § 309, as amended by Laws 1857, chap. 723, § 14. But now an allowance may be granted in such cases if a defense has been interposed in the action.

An allowance can be granted where there has been no trial. The allowance is not given as a counsel fee for trying the cause,²⁴ but on account of the difficult and extraordinary character of the case.²⁵ The only effect of want of litigation on the trial would be to reduce the amount of the allowance, not to defeat it altogether.²⁶

278. Allowance when the complaint is dismissed.—Therefore an allowance can be granted when the complaint is dismissed upon the call of the calendar,²⁷ or for nonprosecution,²⁸ or upon a regular default,²⁹ or where the plaintiff submits to a nonsuit on the ruling by the judge upon his opening,³⁰ or where the plaintiff submits to a nonsuit while the defendant's attorney is addressing the jury.³¹ But where an equity case is put on the trial term calendar for the trial of certain issues, and is stricken from the calendar as on a default, costs are not allowed the defendant; neither can an additional allowance be granted.³²

279. — upon the discontinuance of an action.—An allowance can be granted where the action has been discontinued either

²³*Randolph v. Foster*, 3 E. D. Smith, 648, 4 Abb. Pr. 262.

²⁹*Mora v. Great Western Ins. Co.* 10 Bosw. 622.

²⁴*M'Quade v. New York & E. R. Co.* 5 Duer, 613, 11 How. Pr. 434.

³⁰*Wood v. Illinois C. R. Co.* 20 How. Pr. 285; *Shiels v. Wortmann*,

²⁵*Dodd v. Curry*, 4 How. Pr. 123; *Lawrence v. Davis*, 7 How. Pr. 354;

30 N. Y. S. R. 173, 8 N. Y. Supp. 199.

Shannon v. Brower, 2 Abb. Pr. 377.

³¹*Allaire v. Lee*, 4 Duer, 609, 1 Abb. N. C. 125.

²⁶*Rogers v. Degen*, 4 Bosw. 669, 19 How. Pr. 119, 10 Abb. Pr. 313.

³²*Toch v. Toch*, 9 App. Div. 501, 41

²⁷*Rogers v. Degen*, 4 Bosw. 669, 19 How. Pr. 119, 10 Abb. Pr. 313.

N. Y. Supp. 353.

²⁸*Mills v. Watson*, 13 Jones & S. 591.

upon stipulation, which leaves the matter of an allowance to be disposed of by the court, or upon an order obtained *ex parte*,³³ or upon an order obtained upon notice.³⁴ An additional allowance can be granted upon the discontinuance by the plaintiff after serving an amended complaint, and before the service of the defendant's answer thereto, an issue having been joined by answer to the original complaint.³⁵

An additional allowance can be granted where an order permitted the plaintiff to discontinue on payment of costs, to be taxed by the clerk;³⁶ or where the parties agreed to discontinue an action upon the payment of costs.³⁷ An additional allowance may be granted as a condition of discontinuance, where there is an objection to the jurisdiction of the court.³⁸ Receiving taxable costs, up to the time of the discontinuance obtained *ex parte*, does not prejudice a pending motion for additional allowance.³⁹ The receiving of disbursements and costs, without reserving the right to move for additional allowances, will be a bar to such an application.⁴⁰

280. — upon offer of judgment.— An allowance can be granted upon a judgment entered upon an offer of judgment.⁴¹ The

³³*Angier v. Hager*, 51 App. Div. 171, 64 N. Y. Supp. 692; *Folsom v. Van Wagner*, 14 Abb. Pr. N. S. 44, 616. 7 Lans. 309.

³⁷*New York Hospital Soc. v. Coe*, 15 Hun, 440; *Coffin v. Coke*, 4 Hun.

³⁸*Brown v. Safeguard Ins. Co.* 7

³⁴*Howell v. Miller*, 12 Daly, 277; Abb. Pr. 345.

Harlem, M. & F. R. Co. v. Westchester, 143 N. Y. 59, 60 N. Y. S. R. 349, 37 N. E. 634; *Lockwood v. Salmon River Paper Co.* 49 N. Y. S. R. 303, 20 N. Y. Supp. 974; *Stallman v. Kimberly*, 33 N. Y. S. R. 813, 11 N. Y. Supp. 518.

³⁹*Moulton v. Beecher*, 11 Hun, 192, 53 How. Pr. 86, Affirming 52 How. Pr. 230, 1 Abb. N. C. 193.

⁴⁰*Lockman v. Ellis*, 58 How. Pr. 100.

⁴¹*Safety Steam Generator Co. v. Dickson Mfg. Co.* 61 Hun, 335, 21 N. Y. Civ. Proc. Rep. 329, 40 N. Y. S. R. 601, 16 N. Y. Supp. 32; *Coates v. Goddard*, 2 Jones & S. 118; *Wing v. De LaRionda*, 126 N. Y. 680, 28 N. E. 223.

³⁶*Brown v. Safeguard Ins. Co.* 7 Abb. Pr. 345; *Bright v. Milwaukee & St. P. R. Co.* 1 Abb. N. C. 14; *Robins v. Gould*, 1 Abb. N. C. 133; *Bryon v. Durrie*, 6 Abb. N. C. 135.

contrary has been held at special term, but this must be deemed to have been overruled by the subsequent decisions.⁴²

281. — upon overruling a demurrer.—Upon overruling a demurrer, with leave to the party to plead over upon payment of costs, the majority of cases hold that an additional allowance cannot be granted.⁴³ Where the court of appeals has held that the demurrer to the complaint was insufficient, and ordered judgment for the plaintiff, with leave to the defendant to answer upon payment of costs, the court below cannot grant an additional allowance and compel the defendant to pay that.⁴⁴ But where there has been a final decision upon a demurrer, an allowance can be granted.⁴⁵ Or where a demurrer has been overruled, with privilege to the defendant to answer, and no answer is served, an allowance can be granted upon the final judgment.⁴⁶ An additional allowance can be granted upon a judgment rendered upon a motion for judgment, made on the ground that the demurrer was frivolous.⁴⁷ The entry of an interlocutory judgment upon the decision of the demurrer is not a bar to the successful party moving for an additional allowance. The judgment referred to in General Rule 45 is the final judgment.⁴⁸ But where a demurrer to a complaint is sustained on the ground that the court has no jurisdiction, and further investigation is

⁴²*Pool v. Osborn*, 8 N. Y. Civ. Proc. S. 58; *Merchants' Exch. Nat. Bank* Rep. 232, note; *Dadison v. Waring*, v. *Commercial Warehouse Co.* 3 9 How. Pr. 254. *Jones & S.* 214.

⁴³*Fay v. Muhlker*, 13 Daly, 314; *Lowry v. Inman*, 37 How. Pr. 286, *Merchants' Exch. Nat. Bank v. Commercial Warehouse Co.* 3 Jones & S. 214; *Victor v. Halstead*, 38 N. Y. S. R. 407, 14 N. Y. 214; *Hauselt v. Taussig*, 3 N. Y. Supp. 516; *Kingsland v. New York*, Code Rep. 236; *De Stuckle v. Tehuantepec R. Co.* 30 Hun, 34, 65 52 Hun, 99, 16 N. Y. Civ. Proc. Rep. 323, 22 N. Y. S. R. 497, 4 N. Y. Supp. How. Pr. 288, 3 N. Y. Civ. Proc. Rep. 685; *New York Elev. R. Co. v. Harold*, 30 Hun, 466.

Assur. Soc. 30 Misc. 530, 63 N. Y. Supp. 853; *Winne v. Fanning*, 19 667; *Small v. Ludlow*, 1 Hilt. 307.

Misc. 410, 44 N. Y. Supp. 262. *First Nat. Bank v. Bush*, 47 *contra*, *Williams v. Kiernan*, 4 Month. How. Pr. 78.

L. Bull. 41. *Abbey v. Wheeler*, 57 App. Div.

⁴⁴*McDonald v. Mallory*, 14 Jones & 417, 68 N. Y. Supp. 252.

necessary to fix the amount, no allowance can be granted, because the court cannot inquire into a matter over which it has no jurisdiction.⁴⁹

An allowance cannot be granted till all the issues of the case are settled, where some defendants answer and some demur, and then only on notice to all the defendants, because only \$2,000 additional allowance can be granted to all of the parties on the same side of a case.⁵⁰

282. To whom application must be made.—The allowance must be made by the court, and not by the justice in chambers.⁵¹ The provisions of § 769 of the Code of Civil Procedure must prevail over the provisions of Rule 45. Where the judge who presided at the trial of the case makes an allowance upon a motion made contrary to the provisions of § 769, the attorney for the defeated party objecting to the jurisdiction of the court, the allowance will be set aside.⁵² The application for additional allowance must be made to the court before which the trial is had.⁵³ Where the motion is not thus made, it is an irregularity which will be deemed waived unless objection is made at the time of the application.⁵⁴ The application should be made at the term at which the case is tried, or before the justice who presided.⁵⁵ Where a complaint is dismissed on motion, and the judge who granted the motion has had presented to him only the facts upon which the motion was based, the reason for the rule

⁴⁹*Genet v. Delaware & H. Canal Co.* 57 Hun. 174, 19 N. Y. Civ. Proc. Rep. 82, 32 N. Y. S. R. 269, 10 N. Y. Supp. 467.

⁵⁰*Bush v. O'Brien*, 52 App. Div. 452, 65 N. Y. Supp. 131.

⁵¹Code Civ. Proc. § 3253; General Rules of Practice, 45; *Mann v. Tyler*, 6 How. Pr. 235.

⁵²*Hun v. Salter*, 92 N. Y. 651; *Bear v. American Rapid Teleg. Co.* 36 Hun. 400.

⁵³Rule 452; *Hun v. Salter*, 92 N. Y. 651.

⁵⁴*Wiley v. Long Island R. Co.* 88 Hun. 177, 68 N. Y. S. R. 425, 34 N. Y. Supp. 415.

⁵⁵*Osborne v. Betts*, 8 How. Pr. 31; *Saratoga & W. R. Co. v. McCoy*, 9 How. Pr. 339; *Dyckman v. McDonald*, 5 How. Pr. 121; *Van Rensselaer v. Kidd*, 5 How. Pr. 242, 2 N. Y. Code Rep. 224; *Sackett v. Ball*, 4 How. Pr. 71; *Flint v. Richardson*, 2 N. Y. Code Rep. 80; *Toch v. Toch*, 9 App. Div. 501, 41 N. Y. Supp. 353.

that the application must be made to the judge who presided at the trial ceases, and the motion may be made before any other judge.⁵⁶

Where the justice who presided at the trial passes upon the question of an additional allowance, another judge at the special term has no power to set aside or reverse it. That can only be done by appeal.⁵⁷ A party is not entitled to an additional allowance unless he is also entitled to costs, either by statute or by a decision of the court; and where, in an equity action, the trial justice does not award costs, an additional allowance cannot be granted by another justice.⁵⁸ Such justice would not have power to grant an additional allowance, although the trial justice had granted costs. Where costs have been granted by the trial justice and another justice has entertained a motion for an additional allowance, the latter may vacate his order, whether he granted or refused an additional allowance, and direct the motion for additional allowance to be heard before the trial justice.⁵⁹

283. Power of referee to grant an additional allowance.—

A referee awards costs in an action referred to him to hear, try, and determine, and his discretion can be reviewed only by appeal from the judgment; but an additional allowance in such an action is granted by the court, the referee making a certificate that the case is difficult and extraordinary.⁶⁰

284. Upon what papers the application should be made.— It is

⁵⁶*Wilber v. Williams*, 4 App. Div. Co. 70 Hun. 374, 23 N. Y. Civ. Proc. 444, 38 N. Y. Supp. 893; *Hotaling v. Rep.* 180.54 N. Y. S. R. 286, 24 N. Y. v. *Marsh*, 14 Abb. Pr. 161. Supp. 422; *Couch v. Millard*, 3 How.

⁵⁷*Fisher v. Hepburn*, 48 N. Y. 41; Pr. N. S. 22. 8 N. Y. Civ. Proc. Rep. *Dresser v. Jennings*, 3 Abb. Pr. 240, 431; *Main v. Pope*, 16 How. Pr. 271;

⁵⁸*Kahn v. Schmidt*, 83 Hun. 541, *Howe v. Muir*, 4 How. Pr. 252, 3 N. 65 N. Y. S. R. 190, 32 N. Y. Supp. 33. Y. Code Rep. 21; *Gould v. Chapin*,

⁵⁹*Lottimer v. Livermore*, 6 Daly, 4 How. Pr. 185, 2 N. Y. Code Rep. 501. 107. *Contra*, *Gurney v. Union*

⁶⁰*Proctor v. Soulier*, 8 App. Div. *Transfer & Storage Co.* 25 Jones & 69. 40 N. Y. Supp. 459; *Pinsker v. S.* 444, 29 N. Y. S. R. 274, 8 N. Y. *Pinsker*, 44 App. Div. 501, 60 N. Y. Supp. 549. Supp. 902; *Dode v. Manhattan R.*

usual to ask for the allowance upon the coming in of the verdict, without any other papers than those already in the case. It may be made later in that term without notice to the opposite party, and he need not be in court.⁶¹ Where an application is not made at that term, it should be made on papers showing some specific facts,—such as money expended, time and labor consumed on the trial, the number of trials and postponements and arguments on appeal, whether a long account was involved, and whether a reference was had, so that the court may form an adequate idea of the case, and if an appeal is taken, so that the appellate court may form some idea of the facts.⁶² The clerk need not have a written order to authorize him to tax an additional allowance, where he has the minutes of the deputy clerk kept on the trial, together with his affidavit that an additional allowance was granted. That is sufficient authority for him to tax the allowance.⁶³ Where no sum is mentioned in the complaint for which judgment is demanded, and the relief is not in money damages, the value of the subject-matter of the action may be shown by affidavits upon an application to the court by the successful party for an additional allowance;⁶⁴ but the clerk has no power to take proof of such value for the purpose of fixing the amount of allowance.⁶⁵

285. Allowance when both parties succeed.—An allowance may be made when both parties succeed as to a part of the contention. The defendant, if he wishes to avoid costs and additional allowance, should make an offer of judgment.⁶³

283. — when the court of appeals renders judgment absolute

⁶¹*Mautner v. Pike*, 32 Misc. 500, Supp. 905. Affirmed 158 N. Y. 735, 66 N. Y. Supp. 387; *Mitchell v. Hall*, 53 N. E. 1126; *Coleman v. Chauncey*, 7 How. Pr. 490. 7 Robt. 578.

⁶²*Gori v. Smith*, 6 Robt. 563, 3 Abb. Pr. N. S. 51; *People v. New York C. R. Co.* 30 How. Pr. 148. ⁶³*Newton v. Reid*, 24 N. Y. Week Dig. 472.

⁶⁴*Smith v. Coe*, 7 Robt. 477. ⁶⁵*State Bank v. Smith*, 85 Hun, 200, 66 N. Y. S. R. 483, 32 N. Y.

⁶⁵*Hayden v. Matthews*, 4 App. Div. Supp. 999. 338, 74 N. Y. S. R. 589, 33 N. Y.

upon a stipulation.—Where the court of appeals renders judgment absolute upon the usual stipulation of the parties, and the successful party has not had an opportunity to ask for an additional allowance, the court below has power to grant such an allowance.⁶⁷ This allowance must be granted upon an application to the court, on notice after the usual order is obtained upon the remittitur “that the judgment of the court of appeals be and hereby is made the judgment of this court,” but before final judgment is entered upon the order.⁶⁸ The court of original jurisdiction has no power to make any order in the case until the case is brought back to that court, which is done by obtaining the usual order. General Rule of Practice 45 provides that the application for an additional allowance shall be made before the final costs are adjusted. There are cases which hold that the trial court has no power to make any allowance,⁶⁹ while other cases hold that the courts have power to grant the allowance even after final judgment has been entered upon the remittitur.⁷⁰ The trial court certainly has power to grant costs in such a case where the costs are in the discretion of the court, unless the court of appeals has passed upon and disposed of that question. If the trial court can grant the general costs of the action it certainly has the power to grant an additional allowance in a proper case. The trial court has power to set aside the taxation of costs and open the judgment upon an application to it. This the court must do when it grants an allowance after final judgment is entered. See § 279, *supra*.

Where exceptions are ordered heard at the appellate division in the first instance, it has no power to award an additional allowance upon overruling the exceptions. In such a case, after

⁶⁷*Jermain v. Lake Shore & M. S. R. Co.* 31 Hun, 558. ⁶⁹*Parrott v. Sawyer*, 26 Hun, 466; *Brown v. Farmers' Loan & T. Co.* 24

⁶⁸*Clarke v. Rochester*, 29 How. Pr. Abb. N. C. 160, 18 N. Y. Civ. Proc. 97; General Rules of Practice, 45. Rep. 131, 9 N. Y. Supp. 337.

⁷⁰*Eldridge v. Strenz*, 7 Jones & S. 295; *McGregor v. Buell*, 1 Keyes, 153, 3 Abb. App. Dec. 86.

obtaining the order the successful party should apply upon notice for an allowance.⁷¹

287. Number of allowances in an action.—When the judgment is reversed the additional allowance based thereon falls.⁷² If on a new trial, the same party succeeds, a new allowance must be granted. The former allowance cannot be taxed.⁷³ There is one case that holds otherwise, but it is now of very doubtful authority.⁷⁴

In an ejectment action where a new trial is had pursuant to § 1525 of the Code of Civil Procedure, an additional allowance may be granted on the second trial, although one was granted on the former trial which was paid in order to entitle the party to a new trial, and although the sum of the two allowances exceed 5 per cent of the value of the property in question.⁷⁵

288. What determines the fact that an action is difficult and extraordinary. *a. In general.*—Whether a case is difficult and extraordinary is determined by the facts transpiring in the trial court. The labor and expense involved in an appeal is not considered. Therefore an allowance cannot properly be made in a controversy upon an agreed case under § 1279 of the Code of Civil Procedure.⁷⁶ This case overrules several general term cases.⁷⁷ Whether a case should be regarded as difficult and ex-

⁷¹*Moskowitz v. Hornberger*, 20 Misc. 558, 46 N. Y. Supp. 462.

⁷⁴*Howell v. Van Sicklen*, 70 N. Y. 595, 4 Abb. N. C. 1.

⁷²*Hicks v. Waltermire*, 7 How. Pr. 370; *Sleight v. Hancock*, 4 Abb. Pr. 245; *M'Quade v. New York & E. R. Co.* 5 Duer, 613, 11 How. Pr. 434; *Monnet v. Merz*, 30 Abb. N. C. 281. 54 N. Y. S. R. 322, 24 N. Y. Supp. 485.

⁷³*Bolton v. Schriever*, 135 N. Y. 65, 18 L. R. A. 242, 29 Abb. N. C. 300, 47 N. Y. S. R. 870, 31 N. E. 1001; *Wing v. De La Rionda*, 39 N. Y. S. R. 119, 15 N. Y. Supp. 533.

⁷⁶*People v. Fitchburg R. Co.* 133 N. Y. 239, 44 N. Y. S. R. 907, 30 N. E. 1011.

⁷⁵*Meeker v. C. R. Remington & Son Co.* 62 App. Div. 476, 70 N. Y. Supp. 1072; *Flynn v. Equitable Life Assur. Soc.* 18 Hun, 212; *Union Trust Co. v. Whiton*, 17 Hun, 594; *De Stuckle v. Tehuantepec R. Co.* 3 N. Y. Civ. Proc. Rep. 411; *Bank of Mobile v. Phoenix Ins. Co.* 8 N. Y. Civ. Proc. Rep. 212.

⁷⁷*Kingsland v. New York*, 52 Hun. 98, 16 N. Y. Civ. Proc. Rep. 323, 22 N. Y. S. R. 497, 4 N. Y. Supp. 685; *Neilson v. Mutual L. Ins. Co.* 3 Duer, 683; *New York Elev. R. Co. v. Harold*, 30 Hun, 466.

traordinary rests substantially in the judgment and discretion of the judge to whom the application is made, and the determination of the question usually involves so many considerations which are addressed to the discretion of the judge that the appellate court rarely interferes.⁷⁸ Each case must be decided on its own circumstances.⁷⁹

A case may be difficult and extraordinary although no trial is had, and the plaintiff discontinues upon payment of costs.⁸⁰

b. Difficult question of law.—A case is difficult and extraordinary when it involves the expenditure of considerable time in the examination of a vexed question of law, although the trial occupied but a short time,⁸¹ or judgment is granted upon the ground that the demurrer is frivolous.⁸²

c. Difficult question of fact.—A case is difficult and extraordinary where the proof requires a great deal of work,—as, the proof of the sale and delivery of a great many items;⁸³ or many⁸⁴ or expert witnesses are necessary;⁸⁵ or the examination of a long account.⁸⁶

d. Length of time of trial.—The fact that the trial of the case takes an unusually long time is an element in deciding that a

⁷⁸*Meyer Rubber Co. v. Lester Shoe v. Fox*, 24 How. Pr. 385; *Lane v. Co.* 92 Hun, 52, 71 N. Y. S. R. 740. *Van Orden*, 11 Abb. N. C. 228, 63 36 N. Y. Supp. 729; *Mutual L. Ins.* How. Pr. 237; *National Tradersmen's Co. v. Cranwell*, 32 N. Y. S. R. 376. *Bank v. Wetmore*, 10 N. Y. S. R. 10 N. Y. Supp. 404; *Hanover F. Ins.* 640, Reversed in 124 N. Y. 241, 35 N. Co. v. *Germania F. Ins. Co.* 138 N. Y. S. R. 316, 26 N. E. 548. Y. 252, 33 N. E. 1065; *Downing v.* ⁸²*National Bank v. Bush*, 47 How. Marshall, 37 N. Y. 380; *Bryon v.* Pr. 78. *Durrie*, 6 Abb. N. C. 135; *Morss v.* ⁸³*National Lead Co. v. Dauchy*, 22 Hasbrouck, 13 N. Y. Week. Dig. 393; Misc. 372, 49 N. Y. Supp. 379; *Fox Hurd v. Farmers' Loan & T. Co.* 16 v. *Fox*, 24 How. Pr. 385. N. Y. Week. Dig. 480. ⁸⁴*McCulloch v. Dobson*, 39 N. Y. S.

⁷⁹*Sackett v. Ball*, 4 How. Pr. 71, R. 908, 15 N. Y. Supp. 602. ⁸⁵*Howard v. Rome & T. Pl. Road* 2 N. Y. Code Rep. 47; *Fox v. Gould*, 53 How. Pr. 278, 3 N. Y. Code Rep. Co. 4 How. Pr. 416, 3 N. Y. Code Rep. 41. 209.

⁸⁰*Coffin v. Coke*, 4 Hun, 616.

⁸¹*Vanderveer v. Vanderveer*, 17 N. 629, 65 N. Y. Supp. 931. Y. S. R. 648, 1 N. Y. Supp. 897; *Fox*

cast is difficult and extraordinary,⁸⁷ but does not itself constitute a case difficult and extraordinary.⁸⁸

e. More than one trial.—The fact that there has been more than one trial is a pertinent fact.⁸⁹

f. Eminence of counsel.—The eminence of counsel engaged in the trial is a pertinent fact,⁹⁰ but is not a sufficient reason for allowing a large sum.⁹¹ The fact that upon the first trial an allowance was denied is no ground for denying it upon the second trial.⁹² But where the first trial was difficult and extraordinary, and the second trial was neither difficult nor extraordinary, an allowance may be made to the party who was successful on both trials.⁹³

g. Other considerations.—The amount involved in the litigation is also to be considered.⁹⁴ An extra allowance has been granted when the complaint was dismissed upon the failure of the plaintiff to appear,⁹⁵ or upon a trial where the plaintiff has demanded a large sum,⁹⁶ or where the defendant unnecessarily defends,⁹⁷ or where the defendants unnecessarily severed their defense, thereby increasing the labor of the plaintiff.⁹⁸

In the first and second departments the statute is construed much more liberally than in the rest of the state. The fact that

⁸⁷*Fox v. Fox*, 24 How. Pr. 385; *Dorsett v. Ormiston*, 53 App. Div. 629, 65 N. Y. Supp. 931; *Fort v. Gooding*, 9 Barb. 388.

⁸⁸*Sands v. Sands*, 6 How. Pr. 453; *Dexter v. Gardner*, 5 How. Pr. 417, N. Y. Code Rep. N. S. 80; *Howard v. Rome & T. Pl. Road Co.*, 4 How. Pr. 416, 3 N. Y. Code Rep. 41; *Fox v. Fox*, 24 How. Pr. 385.

⁸⁹*Howell v. Van Sicken*, 8 Hun. 524, 54 How. Pr. 264. Affirmed in 70 N. Y. 595, 4 Abb. N. C. 1; *Comins v. Jefferson County*, 3 Thomp. & C. 296, Affirmed in 64 N. Y. 626; *Lahey v. Kortright*, 26 Jones & S. 576, 19 N. Y. Civ. Proc. Rep. 80, 32 N. Y. S. R. 112, 11 N. Y. Supp. 47.

⁹⁰*Fox v. Fox*, 24 How. Pr. 385.

⁹¹*Schwartz v. Poughkeepsie Mut F. Ins. Co.* 10 How. Pr. 93; *Sackett v. Ball*, 4 How. Pr. 71, 2 N. Y. Code Rep. 47.

⁹²*Fox v. Fox*, 24 How. Pr. 385.

⁹³*Howell v. Van Sicken*, 70 N. Y. 595, 4 Abb. N. C. 1.

⁹⁴*Fox v. Fox*, 24 How. Pr. 385; *Cornwell v. Parke*, 52 Hun. 596, 23 N. Y. S. R. 829, 5 N. Y. Supp. 905. Affirmed with no opinion in 123 N. Y. 657, 25 N. E. 955; *Gooding v. Brown*, 35 Hun. 153.

⁹⁵*Mills v. Watson*, 13 Jones & S. 591.

⁹⁶*Morrison v. Agate*, 20 Hun. 23.

⁹⁷*Livingston v. Gidney*, 25 How. Pr. 1.

⁹⁸*Fort v. Gooding*, 9 Barb. 388.

an injunction had been granted in a case in which the plaintiff had agreed to indemnify the defendant is not an answer upon the application of the latter for an additional allowance, although the court would take into consideration upon that part of the case an allowance made on the trial of the main issue.⁹⁹

289. What determines the fact that the action is not difficult and extraordinary. *a. Simple question of law or fact.*—A party has been held not entitled to an additional allowance when the question of law was simple,¹⁰⁰ or judgment was given on a frivolous answer,¹⁰¹ or the question of fact was easy, although witnesses were brought a long distance,¹⁰² or the party had never been called upon to meet the question upon a trial,¹⁰³ or the contest was between defendants, and no dispute of the plaintiff's claim was made.¹⁰⁴

b. Length of time of trial.—An allowance is sometimes refused because the trial occupied but a short time,¹⁰⁵ or was protracted because the party who succeeded claimed too much.¹⁰⁶

c. Difficult and extraordinary question decided against the prevailing party.—If the questions in a case are difficult and extraordinary, they must be decided in favor of the successful party, to entitle him to an extra allowance.¹⁰⁷ If the action is difficult and extraordinary because the plaintiff advanced claims which he afterwards abandoned, he should not be granted an additional allowance.¹⁰⁸

⁹⁹*Williams v. Western U. Teleg.* 472; *Knauth v. Weatheim*, 26 Abb. Co. 61 How. Pr. 305. *N. C.* 369, 14 N. Y. Supp. 391.

¹⁰⁰*Williamson v. Newhall*, 15 N. Y. *Poillon v. Cudlipp*, 50 How. Pr. Week. Dig. 352; *Lozier v. Saratoga* 366.

Gas & E. L. & P. Co. 59 App. Div. ¹⁰⁶*Gillespy v. Bilbrough*, 15 App. 390, 69 N. Y. Supp. 247; *Powers v.* Div. 212, 44 N. Y. Supp. 260; *Dexter v. Gardner*, 5 How. Pr. 417, N. Wolcott, 12 How. Pr. 565.

¹⁰¹*Hale v. Prentice*, 1 N. Y. Code Y. Code Rep. N. S. 80. *Rep.* 81; *Beers v. Squire*, 1 N. Y. ¹⁰⁷*Sands v. Sands*, 6 How. Pr. 453. Code Rep. 84. ¹⁰⁸*Commissioners of Pilots v. Spof-*

¹⁰²*Gould v. Chapin*, 4 How. Pr. 185, *ford*, 4 Hun, 74. *2 N. Y. Code Rep.* 107. ¹⁰⁸*Hinman v. Ryder*, 12 Jones & S.

¹⁰³*Duncan v. Dewitt*, 7 Hun, 184; *Krum v. Steele*, 7 N. Y. Week. Dig. 330.

d. Other considerations.—Other considerations that have influenced courts in refusing an additional allowance are that the plaintiff recovers on a mere technicality, when justice was against him,¹⁰⁹—as, where executors failed in an action for dower, brought by their testator and revived in their names, in which she would have succeeded;¹¹⁰ or that the attorney has a contingent interest in a large recovery;¹¹¹ or where the plaintiff claimed \$300 and recovered \$100;¹¹² or where the plaintiff failed in sustaining his claim and the defendant his counterclaim, and the complaint was dismissed;¹¹³ or where the action is not extraordinary, although it is difficult;¹¹⁴ or where the successful party abandoned the only question that made the case difficult and extraordinary;¹¹⁵ or where, in an action to set aside a conveyance as fraudulent, the defendant succeeded on account of the inadequacy of the property to satisfy the liens upon it, and his conduct was such that it justified the plaintiff in bringing the action;¹¹⁶ or where two actions were brought, when all the questions could have been disposed of in one action;¹¹⁷ or where two defendants unnecessarily defended separately and succeeded;¹¹⁸ or where the defendant was surety only;¹¹⁹ or where the plaintiff made an affidavit which made it proper for the defendant to contest the action, and upon the trial the only question was the truth of the affidavit, which the plaintiff explained so that he recovered.¹²⁰ Commissioners appointed under the Laws of 1897, chap. 378, to assess damages in a street open-

¹⁰⁹*Schultze v. New York*, 11 N. Y. Civ. Proc. Rep. 54.

¹¹⁰*McKeen v. Fish*, 33 Hun. 28.

¹¹¹*Allen v. Albany R. Co.* 22 App. Div. 222, 47 N. Y. Supp. 1017.

¹¹²*Fish v. Forrance*, 5 How. Pr. 317.
¹¹³*Hall v. United States Reflector Co.* 5 Month. L. Bull. 1.

¹¹⁴*Smith v. Lehigh Valley R. Co.* 77 App. Div. 47, 80 N. Y. Supp. 390.

¹¹⁵*Hinman v. Ryder*, 12 Jones & S. 330.

¹¹⁶*Baldwin v. Reardon*, 16 Jones & S. 166.

¹¹⁷*Sackett v. Ball*, 4 How. Pr. 71, 2 N. Y. Code Rep. 47.

¹¹⁸*Matthewson v. Thompson*, 9 How. Pr. 231; *Tillman v. Powell*, 13 How. Pr. 117.

¹¹⁹*Gould v. Chapin*, 4 How. Pr. 185, 2 N. Y. Code Rep. 107; *Rice v. Wright*, 3 How. Pr. 405.

¹²⁰*Kelly v. Chenango Valley Sav. Bank*, 45 N. Y. Supp. 658.

ing proceeding are not entitled to an additional allowance, unless the proceeding is unusually difficult and extraordinary.¹²¹

290. How the allowance can be reviewed.— When an allowance is made, it becomes a part of the judgment. The propriety of the allowance may be reviewed by an appeal from the judgment, no formal exception being necessary to enable the appellate division to review the discretion or the legal right of the court to make the award.¹²² The court of appeals can pass upon the question of the legal right involved.¹²³ Earlier cases held that the question would not be brought up on appeal from the judgment,¹²⁴ but these cases must now be considered overruled by the case of *Hanover F. Ins. Co. v. Germania F. Ins. Co.* But if the appeal is not taken from the whole judgment, but from certain portions of it, not including the additional allowance, the court cannot review the question of allowances.¹²⁵ The burden is on the appellant to show the error.¹²⁶ If the papers do not show the amount involved, the court will presume that the allowance does not exceed the legal amount.¹²⁷ Usually the entire order should be presented to the appellate court, although the appeal is taken from only a part of it.¹²⁸ Where counsel is surprised upon a motion for an additional allowance, he should move upon affidavits to vacate the award, and, upon denial of the motion, appeal therefrom.¹²⁹ Where a motion for an additional allowance has been denied, another motion for the same

¹²¹*Re Street Opening*, 33 App. Div. 137, 53 N. Y. Supp. 354.

¹²²*Black v. Brooklyn Heights R. Co.* 32 App. Div. 468, 53 N. Y. Supp. 312.

¹²³*Hanover F. Ins. Co. v. Germania F. Ins. Co.* 138 N. Y. 252, 52 N. Y. S. R. 334, 33 N. E. 1065.

¹²⁴*People v. New York & S. I. Ferry Co.* 7 Hun, 105.

¹²⁵*New York Life Ins. & T. Co. v. Baker*, 38 App. Div. 417, 56 N. Y. Supp. 618.

¹²⁶*Sprague v. Bartholdi Hotel Co.* 3 N. Y. Supp. 828.

¹²⁷*Ereringham v. Vanderbilt*, 12 Hun, 75.

¹²⁸*Hamilton v. Manhattan R. Co.* 25 Jones & S. 491, 24 Abb. N. C. 156, 18 N. Y. Civ. Proc. Rep. 164, 29 N. Y. S. R. 28, 8 N. Y. Supp. 546.

¹²⁹*Bancroft v. Home Benefit Asso.* 26 Jones & S. 492, 35 N. Y. S. R. 459, 12 N. Y. Supp. 718.

thing is irregular and will be denied, unless leave of the court to make such an application has been obtained.¹³⁰

291. Discretion in making allowance reviewed by what courts.—The trial court in its appellate term is the last tribunal to review the discretion of the trial judge in making an allowance.¹³¹

If there is no appellate term of that court,—as, the county court,—there can be no review of the discretion of the judge who made the award. But the award will be reviewed by any court to which an appeal from the judgment lies, if some rule of law is violated, or an allowance is denied on the ground of want of authority.¹³² Where, through inadvertence, the allowance is slightly in excess of the sum allowed by statute, the remedy is by motion to correct the judgment, not by appeal.¹³³

292. Necessity of general costs.—An allowance can be granted only to the party entitled to tax general costs.¹³⁴ If costs are granted neither by statute nor judgment an allowance cannot be granted.¹³⁵ The right to tax costs on appeal is not sufficient;¹³⁶ but the defendant's right to tax costs because the plaintiff recovers less than \$50 is sufficient,¹³⁷ or the defendant's right to

¹³⁰*Manhattan R. Co. v. Klipstein*, 92 N. Y. 401; *Southwick v. 84 Hun.* 579, 65 N. Y. S. R. 850, 32 *Southwick*, 49 N. Y. 510; *Krekeler v. Ritter*, 62 N. Y. 375; *Noyes v. N. Y. Supp.* 729.

¹³¹*Shiels v. Wortmann*, 126 N. Y. 650, 37 N. Y. S. R. 134, 27 N. E. 379; *Krekeler v. Ritter*, 62 N. Y. 372; 602.

Clarke v. Rochester, 34 N. Y. 355; ¹³³*Jordan v. Hess*, 54 N. Y. S. R. 326, 24 N. Y. Supp. 489.

McCulloch v. Dobson, 133 N. Y. 114, 44 N. Y. S. R. 19, 30 N. E. 641; ¹³⁵*Kahn v. Schmidt*, 83 Hun. 541, 65 N. Y. S. R. 190, 32 N. Y. Supp. 33.

Reilly, 18 Misc. 11, 75 N. Y. S. R. 440, 40 N. Y. Supp. 1123; *Mills v. Watson*, 13 Jones & S. 591; *Gooding v. Brown*, 35 Hun. 153; *People v. New York C. R. Co.* 29 N. Y. 418; *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.* 63 N. Y. 176; *Gori v. Smith*, 6 Robt. 563; *Gorham v. Innis*, 115 N. Y. 87, 21 N. E. 722. ¹³⁶*Savage v. Allen*, 2 Thomp. & C. 474; *Clarke v. Rochester*, 34 N. Y. 355; *Beals v. Benjamin*, 29 Hun. Pr. 101; *People v. Central R. Co.* 30 How. Pr. 148; *Van Rensselaer v. Kidd*, 5 How. Pr. 242, 3 N. Y. Code Rep. 224; *Martin v. McCormick*, 3 Sandf. 755; *McQuade v. New York & E. R. Co.* 5 Duer, 613, 11 How. Pr. 434; *Wolfe v. Van Nostrand*, 2 N. Y. 570; *Couch v. Millard*, 41 Hun. 212.

¹³⁷*United Press v. New York Press* & *Shiels v. Wortmann*, 126 N. Y. 650, 37 N. Y. S. R. 134, 27 N. E. 379; *Conaughly v. Saratoga Conn-*

tax costs because he made an offer more favorable than the plaintiff's recovery.¹³⁸

293. By what statute governed.—An additional allowance is governed by the law in force at the time of the rendition of the verdict, not by that of the time of the entry of the judgment.¹³⁹

294. Power of the court over the allowance.—Judgment may be entered *nunc pro tunc* as of the day of the verdict, under § 763 of the Code of Civil Procedure, where, after the hearing, but before the decision of a motion for additional allowance, one of the opposing parties and their attorney dies.¹⁴⁰

Where a plaintiff brings an action for money damages and the defendant succeeds, the referee who heard the case cannot limit the right of the defendant to apply to the court for an additional allowance.¹⁴¹ The trial judge does not exhaust his power over the granting of an additional allowance, where, in granting the plaintiff the injunction prayed, he sends the question of damages to a referee, and orders that upon the coming in of his report the plaintiff shall have final judgment for damages, costs, and additional allowance to be fixed by the court. If the plaintiff decides not to go on with the reference and waives his claim for damages, an additional allowance may be granted or refused.¹⁴²

Where an additional allowance has been inadvertently made in excess of the amount allowed by law, the court has the power to order the attorney who has received it to return the excess of the legal amount.¹⁴³ Where one additional allowance is made to

Co. 164 N. Y. 406, 53 L. R. A. 288, *Contra, Maguin v. Dinsmore*, 47 58 N. E. 527, in effect overruling *How. Pr.* 11, 15 Abb. Pr. N. S. 331. *Murray v. Robinson*, 9 Hun, 137; ¹³⁹*Cook v. New York Floating Dry* *Pinder v. Stoothoff*, 7 Abb. Pr. N. S. *Dock Co.* 1 Hilt. 556.

433. ¹⁴⁰*Arthur v. Schrierer*, 42 N. Y. S. R. 12, 16 N. Y. Supp. 610.

¹³⁸*Landon v. Van Etten*, 57 Hun, 122, 19 N. Y. Civ. Proc. Rep. 78, 32 N. Y. S. R. 439, 10 N. Y. Supp. 802; ¹⁴¹*Ract v. Duviard-Dime*, 21 N. Y. S. R. 736, 4 N. Y. Supp. 156.

Commissioners of Pilots v. Spofford, 3 Hun, 57, 5 Thomp. & C. 453; *Brady v. Durbrow*, 2 E. D. Smith, 78; ¹⁴²*Rawlinson v. Brainerd & A. Co.* 53 App. Div. 147, 65 N. Y. Supp. 762.

Hirschsprung v. Boe, 20 Abb. N. C. 595, 64 N. Y. Supp. 901. ¹⁴³*Cooper v. Cooper*, 51 App. Div. 402, 13 N. Y. Civ. Proc. Rep. 124.

several defendants, and upon appeal the judgment is affirmed as to some and reversed as to others, the court can order that the successful defendants tax their proportional share of the entire allowance.¹⁴⁴

295. Amount claimed in the pleadings.— Where an averment of value contained in one pleading is denied by the pleading of the opposite party the averment of the value is neutralized for the purpose of making an award, and extrinsic proof thereof must be given to give the court as a basis on which to make an award.¹⁴⁵ Where the amount claimed in the complaint is larger than the recovery the additional allowance must be computed upon the amount of the recovery.¹⁴⁶ Where the plaintiff is defeated the basis of an additional allowance is the amount claimed.¹⁴⁷ Upon the report of a referee who finds for plaintiff, with interest from a certain day, interest should be computed on the principal to the date of the report, to obtain the basis for an allowance.¹⁴⁸ The statement of counsel in his opening address, that plaintiff was entitled to a certain sum, has, in the absence of any other evidence of the amount involved, been held sufficient to sustain an allowance to the defendant.¹⁴⁹ When the plaintiff commences an action with a summons and notice which contains a statement of the amount for which judgment will be taken upon default, and he is defeated in the action, he is bound by the statement as to the amount involved in the action.¹⁵⁰ When there is no counterclaim, and the defendant

¹⁴⁴*Metropolitan Elev. R. Co. v. Co.* 89 Hun, 316, 70 N. Y. S. R. 226, *Duggin*, 58 Hun, 156, 19 N. Y. Civ. 35 N. Y. Supp. 566; *Carpenter v. Proc. Rep.* 255, 33 N. Y. S. R. 836. *Shook*, 43 N. Y. S. R. 226, 17 N. Y. 11 N. Y. Supp. 353.

¹⁴⁵*Havocor F. Ins. Co. v. Germania* ¹⁴⁶*Clegg v. Aikens*, 17 Abb. N. C. F. Ins. Co. 138 N. Y. 252, 33 N. E. 88, 8 N. Y. Civ. Proc. Rep. 249. 1065; *Israel v. Metropolitan R. Co.* ¹⁴⁷*Rutty v. Person*, 6 N. Y. Civ. 10 Misc. 722, 64 N. Y. S. R. 638, 31 Proc. Rep. 25. N. Y. Supp. 816.

¹⁴⁸*Wilkinson v. Tiffany*, 4 Abb. Pr. 615, 27 N. Y. Week. Dig. 132, 11 N. 98; *Woodbridge v. First Nat. Bank*. Y. S. R. 121, 13 N. E. 594; *Sentenis* 45 App. Div. 166, 61 N. Y. Supp. 258. v. *Lader*, 140 N. Y. 463, 37 Am. St.

¹⁴⁹*Hart v. Ogdensburg & L. C. R.* Rep. 569, 55 N. Y. S. R. 831, 35 N.

admits that the plaintiff is entitled to recover for a certain portion of the claim sued upon, and the plaintiff recovers judgment, the amount of the judgment is always the basis of an additional allowance, not the amount in dispute.¹⁵¹

296. Motive of plaintiff in commencing the action.—An additional allowance cannot be granted to the defendant on the ground that the plaintiff brought the action in bad faith and for the purpose of embarrassing the defendant so that negotiations could not be completed to raise money to pay off the indebtedness.¹⁵² Nor is the motive of the plaintiff in purchasing the notes sued upon a proper reason for granting the defendant an additional allowance.¹⁵³ Nor should such an allowance be granted to the successful defendant, when his actions were so suspicious that the plaintiff was justified in bringing the action.¹⁵⁴ The defendant should not be compelled to pay an additional allowance, where the conduct of the plaintiff misled him so that he interposed a defense.¹⁵⁵

297. Allowance in taxpayer's action.—In a taxpayer's action, when the plaintiff is defeated, an additional allowance can be granted to the defendant.¹⁵⁶ An allowance can also be granted to the plaintiff in such a case, where he is successful.¹⁵⁷ Where a taxpayer seeks to restrain the performance of a contract, the basis of an additional allowance is the contract price, not the profits thereon.¹⁵⁸ In an action to have bonds declared void, the

E. 650; *Proctor v. Soulier*, 8 App. Div. 69, 40 N. Y. Supp. 459.

¹⁵¹*Austin v. Hartwig*, 17 Jones & S. 256.

¹⁵²*McConnell v. Manhattan Constr. Co.* 16 N. Y. Civ. Proc. Rep. 310. 21 N. Y. S. R. 870, 4 N. Y. Supp. 226.

¹⁵³*Burnett v. Westfall*, 15 How. Pr 420.

¹⁵⁴*Baldwin v. Reardon*, 16 Jones & S. 166.

¹⁵⁵*Kelly v. Chenango Valley Sav. Bank*, 45 N. Y. Supp. 658.

¹⁵⁶*Freeman v. Brooks*, 33 Misc. 450, 68 N. Y. Supp. 437; *Comins v. Jef-*

erson County, 3 Thomp. & C. 296. Affirmed in 64 N. Y. 626; *Barker v.*

Oswegatchie, 62 Hun, 208, 41 N. Y. S. R. 831, 16 N. Y. Supp. 734; *Hart*

v. New York, 16 App. Div. 227, 44 N. Y. Supp. 767; *Gordon v. Strong*,

15 App. Div. 519, 44 N. Y. Supp. 481.

¹⁵⁷*Chase v. Syracuse*, 34 Misc. 144, 69 N. Y. Supp. 469; *People ex rel.*

Morgan v. Westchester County, 39 N. Y. S. R. 798, 15 N. Y. Supp. 580.

¹⁵⁸*Barker v. Oswegatchie*, 62 Hun. 208, 41 N. Y. S. R. 831, 16 N. Y. Supp. 734; *Mingay v. Holly Mfg. Co.*

99 N. Y. 270, 1 N. E. 785.

basis of an allowance is the value of the bonds.¹⁵⁹ But where the action is brought to recover the interest upon the bonds, the amount of interest sought to be recovered, and not the value of the bonds, is the basis of an additional allowance;¹⁶⁰ or, in an action to restrain the laying out of a street, the cost of laying it out in the cheapest way provided in the ordinance.¹⁶¹

298. Actions to apportion a tax or assessment.—Under the old Code, in an action to apportion a tax or assessment upon certain parcels of land, where the entire parcel was liable to be sold for taxes and one owner wished to pay his share, it was held that there was no authority for granting an additional allowance.¹⁶²

299. Real actions. *a. Basis of an allowance in an action on a lease.*—When the subject-matter of an action is a lease, the basis of an additional allowance is the value of the lease. This is not measured by the amount of rent reserved, but is the value of the use of the premises for the term, less the amount of rent that must be paid to occupy them.¹⁶³ Where the plaintiff owns a fractional share of the lease, the additional allowance must be computed only upon that fractional part of the entire value.¹⁶⁴ An additional allowance may be granted to a successful defendant in an action brought for damages to a long lease held by the plaintiff, on the alleged ground that the defendant caused the tenants of the plaintiff to leave.¹⁶⁵

b. — in injunction actions.—In an action to restrain a grantee from carrying on business contrary to the covenants in a deed, an additional allowance must be computed upon the amount of damages recovered, not on the value of the real es-

¹⁵⁹*Sickles v. Richardson*, 14 Hun, 672, 65 How. Pr. 95, 12 Abb. N. C. 110.

¹⁶⁰*Hoag v. Greenwich*, 133 N. Y. 118; *Kochler v. Brady*, 22 App. Div. 152, 44 N. Y. S. R. 519, 30 N. E. 842.

¹⁶¹*Rochester & H. Valley R. Co. v. burgh & L. C. R. Co. v. Vermont & Rochester*, 17 App. Div. 257, 45 N. C. R. Co. 63 N. Y. 176.

¹⁶²*Laws of 1855*, chap. 327; *Powers v. Barr*, 24 Barb. 142.

¹⁶³*Heilman v. Lazarus*, 90 N. Y.

¹⁶⁴*Struthers v. Pearce*, 51 N. Y. 365.

¹⁶⁵*Morrison v. Agate*, 20 Hun, 23.

tate.¹⁶⁶ The basis upon which an additional allowance must be computed in an action to restrain the removal of bark before the close of the peeling season, is the value of the right to remove the bark before the close of the season.¹⁶⁷

Where it is sought to enjoin the defendant from using a certain apparatus over a portion of its road, the basis of an allowance is the value of the use of the apparatus which is sought to be enjoined.¹⁶⁸ In an action to restrain the defendant from draining impure water into an artificial lake, and for damages for past acts, where the question of damages has been tacitly abandoned, and the question litigated was the title to the land under the water, the basis of an additional allowance is the value of the land, not the amount of damages claimed in the complaint.¹⁶⁹

c. — in actions for specific performance.—In an action for the specific performance of a contract for the conveyance of real property or the transfer of personal property the basis of an additional allowance is the value of the property, to compel the transfer of which the action is brought.¹⁷⁰ Where a title is defective and the purchaser brings an action to recover back the money advanced on the contract and his expenses incurred in the examination of the title, the basis is the amount of the recovery, not the value of the property.¹⁷¹ In an action to compel the defendant, who took title in his own name for the benefit of the plaintiff, as well as himself, to convey to the plaintiff, an additional allowance can be made, based upon the plaintiff's interest

¹⁶⁶*Atlantic Dock Co. v. Libby*, 45 279, 67 N. Y. S. R. 741, 33 N. Y. N. Y. 499. Supp. 1055.

¹⁶⁷*Lyon v. Belchford*, 8 N. Y. Civ. ¹⁶⁹*Deuterman v. Gainsborg*, 54 App. Proc. Rep. 229, note. Div. 577, 66 N. Y. Supp. 1009.

¹⁶⁸*Hudson River Teleph. Co. v. Waterlet Turnp. & R. Co.* 135 N. Y. ¹⁷⁰*Gurney v. Union Transfer & Storage Co.* 25 Jones & S. 444, 29 N. 393, 17 L. R. A. 674, 31 Am. St. Rep. Y. S. R. 274, 8 N. Y. Supp. 549.

838, 48 N. Y. S. R. 417, 32 N. E. ¹⁷¹*Moore v. Appleby*, 103 N. Y. 237, 148; *Empire City Subway Co. v.* 15 N. E. 377.

Broadway & S. A. R. Co. 87 Hun, COSTS 24.

in the premises.¹⁷² In an action to compel the specific performance of a land contract the basis is the value of the property which the purchaser is adjudged to accept. The basis is the same when the purchaser brings an action to be relieved of his contract, and the defendant asks that the plaintiff be compelled to fulfil, which the court grants.¹⁷³ Under the old Code an additional allowance could not be made in these cases.¹⁷⁴

d. — in ejectment actions.—Where the plaintiff seeks to recover property from the defendant, which the court decides belongs to the defendant, the basis is the value of the property in dispute.¹⁷⁵ The value of the property affected is the proper basis of an allowance in an action to have deeds declared mortgages.¹⁷⁶ Where the plaintiff seeks to recover real property, and damages for the occupation of the same, the basis of an extra allowance is the value of the real estate, and the amount of damages recovered or sought to be recovered. If the defendant won, the basis would be the value of the real property and the amount of damages claimed in the complaint.¹⁷⁷ An objection that the value of the real estate has not been shown must be taken at the time the allowance is made.¹⁷⁸

e. — in actions to restrain nuisances.—Where the plaintiff obtains an injunction restraining the defendant from overflowing his lands the basis of an allowance is the damages recovered, and not the value of the land.¹⁷⁹

f. — in actions for trespass.—The value of the real property cannot be considered in an action for trespass, where there is no contest as to that; but only the damages can be considered. But

¹⁷²*Quinn v. Quinn*, 69 App. Div. 598, 75 N. Y. Supp. 83.

¹⁷³*Lahey v. Kortright*, 26 Jones & S. 576, 32 N. Y. S. R. 112, 11 N. Y. Supp. 47.

¹⁷⁴*Weeks v. Southwick*, 12 How. Pr. 170.

¹⁷⁵*Williams v. Western U. Teleg. Co.*, 61 How. Pr. 305.

¹⁷⁶*Burke v. Candler*, 63 Barb. 552.

¹⁷⁷*Rank v. Grote*, 18 Jones & S. 275. Affirmed in 110 N. Y. 12, 17 N.

E. 665; *Dresser v. Jennings*, 3 Abb. Pr. 240; *Burton v. Tremper*, 27 N. Y. Week. Dig. 246, 10 N. Y. S. R.

629.

¹⁷⁸*Dresser v. Jennings*, 3 Abb. Pr. 240.

¹⁷⁹*Rothery v. New York Rubber Co.*, 90 N. Y. 30.

where the paramount question is the title of the real property the basis is the value of such property, and not the damages recovered.¹⁸⁰ While the pleadings furnish the sole evidence as to what is the subject-matter involved,¹⁸¹ yet the value thereof, when it has not been shown by the pleadings or the evidence in the case, may be shown by affidavits upon the motion for an additional allowance.¹⁸² The clerk upon the taxation of costs cannot take evidence of the value of the real property involved in the action.¹⁸³ In an action for damages for trespass on lands outside the state where the plaintiff makes default, the supreme court has power to grant an additional allowance, and it can be computed upon the amount of damages claimed.¹⁸⁴

Where the plaintiff succeeds in restraining the completion of a pier and in causing the removal of what had been erected, the basis of an additional allowance is the right to erect the structure, and not the title to the materials, or the value of the structure.¹⁸⁵

g. — in actions against railroads.—Where the plaintiff brings an action to compel the defendant to repair and operate its road the basis is the value of the road.¹⁸⁶ In an action for damages to an abutting owner from the construction of the defendant's road, an additional allowance can be had, not only for past damages, but also for damages for the easements taken, called fee damages. The "fee damages" represent the subject-matter involved.¹⁸⁷ An additional allowance can be made in

¹⁸⁰*Warren v. Buckley*, 2 Abb. N. C. 463, 37 Am. St. Rep. 569, 55 N. Y. 323; *Powers v. Conroy*, 47 How. Pr. S. R. 831, 35 N. E. 650.

84; *Ehle v. Quackenboss*, 6 Hill, 537. ¹⁸⁵*People v. New York & S. I. Ferry*

¹⁸¹*Conaughy v. Saratoga County Co.* 68 N. Y. 71.

Bank, 92 N. Y. 401, 404.

¹⁸²*Hayden v. Matthews*, 4 App. Abb. Pr. 465.

Div. 338, 38 N. Y. Supp. 905; *Conaughy v. Saratoga County Bank*, 28 Hun, 374, 23 N. Y. Civ. Proc. Rep. 180, 54 N. Y. S. R. 286, 24 N. Y.

¹⁸³*Newton v. Reid*, 24 N. Y. Week. Supp. 422, Affirmed in 140 N. Y. 637, Dig. 472. 55 N. Y. S. R. 931, 35 N. E. 892;

¹⁸⁴*Sentenis v. Ladew*, 140 N. Y. *Johnson v. Shelter Island Grove &*

such an action, when the plaintiff succeeds, to the codefendants, who were necessary parties, but who refused to unite as plaintiffs.¹⁸⁸ The amount that the plaintiff claims that his premises have been damaged is the basis of an allowance, when the defendant succeeds in an action for damages to rental value.¹⁸⁹ In an action to restrain the defendant from erecting buildings and thus interfering with the plaintiff's light and air, the value of the easement is the basis of an additional allowance.¹⁹⁰

h. — in partition actions.—In partition actions the basis upon which the allowance is granted is the entire property, not the plaintiff's share. The rents that have been collected by the receiver pending the action are not to be considered real estate for the purpose of computing allowances.¹⁹¹ An allowance should not be made to the plaintiff's wife, who has only an inchoate right of dower; nor to his infant daughter, whose guardian *ad litem* is entitled to taxable costs; nor to the mortgagee of plaintiff's share.¹⁹² An allowance can be made to both plaintiff and defendant, but not to exceed \$2,000 to the plaintiff and \$2,000 to all the defendants.¹⁹³ Under § 3253 of the Code of Civil Procedure as amended in 1899, the court has power to allow the defendant an extra allowance, even where there has been an actual partition.¹⁹⁴ A defense is not interposed so as to entitle the plaintiff to an additional allowance, where one of the defendants alleges that another defendant is indebted to her. The issue thus raised does not tend to defeat the plaintiff's re-

Camp Meeting Asso. 122 N. Y. 330. & *Camp Meeting Asso.* 122 N. Y. 330, 33 N. Y. S. R. 514, 25 N. E. 484; 33 N. Y. S. R. 514, 25 N. E. 484.

Roberts v. New York Elev. R. Co. 12 Misc. 345, 67 N. Y. S. R. 386, 33 N. Y. Supp. 685. ¹⁹¹*Doremus v. Crosby*, 66 Hun, 125, 49 N. Y. S. R. 808, 20 N. Y. Supp. 906.

¹⁸⁸*Roberts v. New York Elev. R. Co.* 12 Misc. 345, 67 N. Y. S. R. 386, 33 N. Y. Supp. 685. ¹⁹²*Doremus v. Crosby*, 66 Hun, 125, 49 N. Y. S. R. 808, 20 N. Y. Supp. 906.

¹⁸⁹*Israel v. Metropolitan R. Co.* 10 Misc. 722, 64 N. Y. S. R. 638, 31 N. Y. Supp. 816. ¹⁹³*Weed v. Paine*, 31 Hun, 10, 13 Abb. N. C. 200. ¹⁹⁴*Crossman v. Wyckoff*, 64 App. Div. 554, 72 N. Y. Supp. 337.

¹⁹⁰*Lattimer v. Livermore*, 72 N. Y. Div. 554, 72 N. Y. Supp. 337. 174; *Johnson v. Shelter Island Grove*

lief.¹⁹⁵ Where an allowance has been made in a decree for a partition and sale, a further allowance cannot be made on making the decree, confirming the sale, and directing the distribution of the proceeds.¹⁹⁶

i. — *in mortgage foreclosures*.—An additional allowance can be made in a mortgage foreclosure the same as in any other case, where there has been a trial.¹⁹⁷ An allowance may be made where defendant unnecessarily defends a mortgage foreclosure.¹⁹⁸

In a mortgage foreclosure the allowance cannot exceed 2½ per cent of the sum in controversy, or \$200, although the case is difficult and litigated.¹⁹⁹ The reason of this is that another percentage is always recovered, as a matter of course.²⁰⁰ An additional allowance of \$100 to the defendant in dismissing a complaint to foreclose a \$5,000 mortgage is not excessive.²⁰¹ The limitation imposed by § 3252 of the Code of Civil Procedure as to mortgage foreclosures does not apply to foreclosures upon leasehold estates, as they are personal property.²⁰² Nor can an allowance be made under subd. 1 of § 3253 of the Code of Civil Procedure.²⁰³ See section 120, subd. j., *ante*.

j. — *in actions to set aside transfers as fraudulent*.—In actions to set aside conveyances or mortgages as made in fraud of creditors, the basis upon which the additional allowance, if

¹⁹⁵*Defendorf v. Defendorf*, 42 App. Div. 166, 59 N. Y. Supp. 163.

¹⁹⁶*Brewer v. Brewer*, 11 Hun. 147. Affirmed, it seems, as *Bremcr v. Peniman*, 72 N. Y. 603, without opinion.

¹⁹⁷*Boeckes v. Kilmer*, 8 N. Y. Week. Dig. 156; *Hunt v. Chapman*, 62 N. Y. 333, 1 N. Y. Week. Dig. 15, which is explained by chap. 431 of Laws of 1876; *Murray v. Church*, 1 Hun. 49, 3 Thomp. & C. 145.

¹⁹⁸*Gidney v. Livingston*, 25 How. Pr. 1.

¹⁹⁹Code Civ. Proc. § 3253, subdv. 1; *Hunt v. Chapman*, 62 N. Y. 333,

1 N. Y. Week. Dig. 15; *O'Neill v. Gray*, 39 Hun. 566; *Ferris v. Hard*, 15 N. Y. Civ. Proc. Rep. 171, 17 N. Y. S. R. 364, 4 N. Y. Supp. 9.

²⁰⁰*O'Neill v. Gray*, 39 Hun. 566; *Rosa v. Jenkins*, 31 Hun. 384. *Contra*, *Boeckes v. Hathorn*, 17 Hun. 87.

²⁰¹*Shaw v. Wellman*, 13 N. Y. Supp. 527.

²⁰²*Huntington v. Moore*, 59 Hun. 351, 20 N. Y. Civ. Proc. Rep. 160, 36 N. Y. S. R. 541, 13 N. Y. Supp. 97.

²⁰³*Barnes v. Meyer*, 25 N. Y. Civ. Proc. Rep. 372, 75 N. Y. S. R. 649, 41 N. Y. Supp. 210.

granted, must be computed, is the sum of the judgments which the plaintiff represents, and not the value of the real estate.²⁰⁴ This is the basis, whichever party wins.²⁰⁵ Where an action is brought to set aside a transfer of a mortgage as fraudulent, on behalf of the plaintiff and other creditors whose claims are set out in the complaint, the amount of the allowance must be computed upon the total of the debts.²⁰⁶

300. Allowance in actions against corporations.—In an action to restrain a corporation from issuing its bonds the basis of an additional allowance is the market value of the bonds, not their par value.²⁰⁷ In an action to restrain the defendant from the further exercise of its corporate functions the basis upon which the allowance must be computed is the value of its franchise, not the value of its assets.²⁰⁸

301. — in actions relating to a fund.—In an action by a stockholder against a corporation in reference to a fund in which the plaintiff has, or claims, a share, the basis of an additional allowance must be the amount of the plaintiff's share of the fund,²⁰⁹ except where he brings the action for the benefit of others interested in the fund, when an additional allowance can be computed upon the amount recovered.²¹⁰ If the action is not so brought, and the other parties entitled to share are made parties defend-

²⁰⁴*Potter v. Farrington*, 24 Hun, Bank, 92 N. Y. 401; *People v. Rochester Dime Sav. & L. Asso.* 7 App. 551, 12 N. Y. Week. Dig. 283; *Hoos v. Person*, 15 N. Y. Week. Dig. 530; Div. 350, 39 N. Y. Supp. 939; *Peo-National Tradesmen's Bank v. Wetmore*, 10 N. Y. S. R. 640; *McConnell v. Manhattan Constr. Co.* 16 N. Y. Supp. 303, Affirmed in 128 N. Y. 240, Civ. Proc. Rep. 310, 21 N. Y. S. R. 40 N. Y. S. R. 280, 28 N. E. 635; 870, 4 N. Y. Supp. 226; *Remington Paper Co. v. O'Dougherty*, 18 N. Y. Co. 28 Hun, 356.

²⁰⁵*T. New Mfg. Co. v. Galway*, 23 N. Y. Civ. Proc. Rep. 239, 26 N. Y. Supp. 959.

²⁰⁶*Hoos v. Person*, 15 N. Y. Week. Dig. 530.

²⁰⁷*Wood v. Iary*, 47 Hun, 550, 15 N. Y. S. R. 209.

²⁰⁸*Conaughty v. Saratoga County*

²⁰⁹*Parish v. New York Produce Exchange*, 54 App. Div. 323, 66 N. Y. Supp. 613; *Mills v. Ross*, 39 App. Div. 563, 57 N. Y. Supp. 680; *Devlin v. New York*, 15 Abb. Pr. N. S. 31.

²¹⁰*Riley v. Hulbert*, 13 N. Y. Week. Dig. 101.

ant and come in and prove their claims, they are not entitled to costs nor to an additional allowance.²¹¹

302. — in actions relating to wills.— In an action to set aside the probate of a will the amount involved is the amount of the estate. If the plaintiff defaults, the defendant can prove his case and is then entitled, in a proper case, to an additional allowance.²¹²

303. — in actions upon insurance policies.— In an action to reinstate a life insurance policy the basis is the surrender value of the policy, not the amount of the policy.²¹³ In an action against one of several indemnitors in a Lloyds insurance the basis of an additional allowance is the amount sought to be recovered of this defendant, and not the amount of the loss.²¹⁴

304. — in action in relation to annuities.— In an action to charge an annuity upon a fund the basis of an additional allowance is the amount due upon the annuity at the time of the trial and the value of the future instalments, based upon the Northampton tables.²¹⁵

305. — in actions relating to the capital stock of corporations.— In the absence of proof the court may, in making an additional allowance, assume that bank stock is worth par, but not more.²¹⁶

In an action to restrain the defendant from selling, without notice, stock pledged by the plaintiff as collateral security, the basis of an additional allowance is the value of this right, not the value of the stock pledged or sold.²¹⁷ In an action to redeem stock upon paying an unpaid assessment the basis of an addi-

²¹¹*Devlin v. New York*, 15 Abb. Pr. N. S. 31.

²¹⁵*Arthur v. Dalton*, 14 App. Div. 115, 43 N. Y. Supp. 581.

²¹²*Delmar v. Delmar*, 65 App. Div. 582, 72 N. Y. Supp. 959.

²¹³*Smith v. Baker*, 42 Hun, 504.

²¹⁵*Strauss v. Union Cent. L. Ins. Co.* 33 Misc. 571, 67 N. Y. Supp. 931.

²¹⁷*Smallwood v. Schwietering*, 10 Misc. 103, 63 N. Y. S. R. 504, 31 N. Y. Supp. 149.

²¹⁴*Laird v. Littlefield*, 34 App. Div. 43, 53 N. Y. Supp. 1082.

tional allowance is the value of the stock in question, less the amount of assessments unpaid.²¹⁸

306. — in actions to recover damages for negligently causing death.— Where, upon the coming in of a verdict in a negligence action, the plaintiff moves for an extra allowance, which is granted by way of a stated percentage, but with no direction or intimation that the percentage was allowed upon anything beyond the verdict, the computation should be based upon the verdict, and not upon the verdict plus the interest which the clerk is required to add to the damages by § 1904 of the Code of Civil Procedure.²¹⁹ But where the allowance is granted, expressly covering the verdict and interest, the computation must be made upon the verdict plus the interest.²²⁰

307. — in partnership accountings.— A plaintiff in a partnership accounting can be granted an allowance only upon his share of the partnership assets.²²¹ In an action by one partner to set aside a transfer of property on the ground that it is partnership assets, he cannot be granted an allowance, in case of his success, because the plaintiff's interest therein cannot be ascertained until after a partnership accounting.²²² Upon a partnership accounting, where it appears that there is not enough to pay the creditors in full, neither of the parties should be granted an allowance, because it would be taking their creditors' money to pay a claim of their debtor.^{222a} Where the plaintiff submits to

²¹⁸*Weeks v. Silver Islet Consol. Min. & Lands Co.* 26 Jones & S. 247, 32 N. Y. S. R. 417, 11 N. Y. Supp. 48. *buchle v. Schultz*, 69 Hun, 183, 53 N. Y. S. R. 598, 23 N. Y. Supp. 611; *Adams v. Arkenburgh*, 106 N. Y. 615, 27 N. Y. Week. Dig. 132, 11 N. Y. S. R. 121, 13 N. E. 594.

²¹⁹*Seifter v. Brooklyn Heights R. Co.* 53 App. Div. 443, 65 N. Y. Supp. 1123; *Sinne v. New York*, 8 N. Y. Civ. Proc. 252, note; 3 Month. L. Bull. 51. ²²⁰*Maloy v. Associated Lace-Makers' Co.* 28 N. Y. S. R. 735, 7 N. Y. Supp. 958; *Spitz v. Tousey*, 22 N. Y. Week. Dig. 446.

²²¹*Bord v. New York C. & H. R. R. Co.* 1 How. Pr. N. S. 1, 14 Abb. N. C. 496, 6 N. Y. Civ. Proc. Rep. 222. ^{222a}*Smith v. Green*, 8 N. Y. Civ. Proc. Rep. 163; *Struthers v. Christal*, 3 Daly, 327.

²²²*Hasbrouck v. Marks*, 58 App. Div. 33, 68 N. Y. Supp. 510; *Hagen-*

a nonsuit in an action for an accounting, after the defendant makes his account an additional allowance to the defendant is proper.²²³ Sometimes in an action for an accounting an allowance is made to all the parties, payable out of the fund.²²⁴

The plaintiff should not be granted an allowance where he has been defeated on a large portion of his claim,²²⁵ or where the trial is occupied with the defendant's counterclaim, upon which the defendant was successful.²²⁶

308. — in actions to restrain use of trademark.—The basis of an allowance in an action to restrain the use of a trademark and for damages for use of the same is the value of the trademark, and the amount of damages recovered.²²⁷ If there is no proof of the value of the trademark, it can be computed only on the amount of damages recovered.²²⁸ Where the defendant wins and the plaintiff has asked for no sum as damages in his complaint, there is no basis upon which to grant the defendant an additional allowance.²²⁹ But if the plaintiff has demanded a certain sum as damages in his complaint, an allowance based on such demand can be allowed the defendant.²³⁰

309. — when the defendant sets up a counterclaim.—Where an answer sets up a counterclaim the basis upon which an allowance is granted is the sum of the amount claimed in the complaint, and the amount of the counterclaim.²³¹

²²³*Shiels v. Wortmann*, 30 N. Y. S. R. 173, 8 N. Y. Supp. 799.

²²⁴*Chester v. Jumel*, 2 Silv. Sup. Ct. 179, 24 N. Y. S. R. 230, 5 N. Y. Supp. 823.

²²⁵*Sands v. Sands*, 6 How. Pr. 453.
²²⁶*New York, L. E. & W. R. Co. v. Carhart*, 39 Hun, 363.

²²⁷*Perkins v. Heert*, 14 Misc. 425, 71 N. Y. S. R. 485, 36 N. Y. Supp. 434; *Waterman v. Shipman*, 47 N. Y. S. R. 418, 19 N. Y. Supp. 976; *Munroe v. Smith*, 23 Abb. N. C. 275, 17 N. Y. Civ. Proc. Rep. 158, 25 N. Y. S. R. 624, 6 N. Y. Supp. 426; *Coates v. Goddard*, 2 Jones & S. 118.

²²⁸*Collins v. Reynolds Card Mfg. Co.* 2 Month. L. Bull. 45.

²²⁹*Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 63 Hun, 297, 22 N. Y. Civ. Proc. Rep. 6, 43 N. Y. S. R. 381, 17 N. Y. Supp. 786.

²³⁰*Munro v. Smith*, 36 N. Y. S. R. 841, 13 N. Y. Supp. 708.

²³¹*Barday v. Culver*, 66 How. Pr. 342, 4 N. Y. Civ. Proc. Rep. 365; *Woonsocket Rubber Co. v. Rubber Clothing Co.* 62 How. Pr. 180, 1 N. Y. Civ. Proc. Rep. 350, 4 Month. L. Bull. 3; *Vilmar v. Schall*, 61 N. Y.

Where no amount is claimed either in the complaint or in the counterclaim the allowance must be computed on the amount of the recovery.²³² But where the defendant sets up a counterclaim for an unliquidated amount and recovers any sum thereon, the plaintiff, who recovers judgment, cannot be allowed any additional allowance for any amount on the counterclaim.²³³ The plaintiff is not entitled to an allowance where the defendant concedes his claim, but asserts a counterclaim upon which he obtains a substantial recovery, and thus, in reality, is the successful party, although the plaintiff may be entitled to judgment.²³⁴ Nor is he entitled to an allowance based on the defendant's counterclaim, when there has been no judgment in favor of the plaintiff upon it.²³⁵

310. Effect of the defendant winning by pleading the statute of limitations.—An extra allowance may be granted to a defendant who wins by pleading the statute of limitations.²³⁶ If the action is not difficult and extraordinary in other respects, an allowance should be denied.²³⁷

311. Actions in which there is no basis for an additional allowance. *a. In general.*—Though a possible money value may accrue incidently, it does not warrant the granting of an additional allowance to the successful party.²³⁸ Thus, where the plaintiff succeeds in restraining the common council of a city from arbitrarily setting aside the report of commissioners

564; *Williams v. Western U. Teleg. Co.* 61 How. Pr. 305; *Barnes v. Denslow*, 30 N. Y. S. R. 315, 9 N. Y. Supp. 53, Affirmed without opinion in 130 N. Y. 687, 30 N. E. 67; *Lissberger v. Schoenberg Metal Co.* 2 N. Y. City Ct. Rep. 158.

²³²*Tolan v. Carr*, 12 Daly, 520, 19 N. Y. Week. Dig. 484.

²³³*Bates v. Fish Bros. Wagon Co.* 50 App. Div. 38, 63 N. Y. Supp. 649.

²³⁴*Commercial Nat. Bank v. Hand*, 27 App. Div. 145, 50 N. Y. Supp. 515; *New York, L. E. & W. R. Co. v. Carhart*, 39 Hun, 363.

²³⁵*Hammann v. Jordan*, 27 Jones & S. 95, 36 N. Y. S. R. 434, 13 N. Y. Supp. 803.

²³⁶*People v. Clarke*, 9 N. Y. 349.

²³⁷*Adams v. Stern*, 29 Hun, 280.

²³⁸*Schneider v. Rochester*, 50 App. Div. 22, 63 N. Y. Supp. 369; *People ex rel. Winans v. Adams*, 128 N. Y. 129, 21 N. Y. Civ. Proc. Rep. 159, 38 N. Y. S. R. 880, 27 N. E. 1075; *Husted v. Thomson*, 38 App. Div. 315, 57 N. Y. Supp. 9.

in a condemnation proceeding, an allowance cannot be made, based upon the amount of the award, as the common council may pass upon the matter judicially, and set it aside.²³⁹

b. Quo warranto.—Where an action is brought to try the title to a public office, there is no basis for an additional allowance. The principal subject of the action is the office, not the salary.²⁴⁰ In an action to remove an officer of a corporation the subject-matter involved is the conduct of the defendant, which can have no money value,²⁴¹ or the title to the office, which has no money value.²⁴²

c. Actions to restrain the use of a trademark.—When the defendant succeeds in an action to restrain the use of a trademark, and the court decides that there is no trademark right, there is no basis for an extra allowance.²⁴³ The court has no power to ascertain, by reference or otherwise, the value of the trademark. In such a case an allowance made by the court without any allegation in the complaint of the amount of damages for which judgment is asked, nor of any proof thereof upon the trial, will be set aside.²⁴⁴ If the complaint asked for a certain sum as damages, then an allowance could be made to the successful defendant, because the action would be, not only to restrain the use of the trademark, but also for damages. An allowance will be refused to the plaintiff in such an action, where his trademark is sustained, but no damages awarded him. The subject-matter involved was the damage to the trademark.²⁴⁵

²³⁹*Schneider v. Rochester*, 50 App. Div. 22, 63 N. Y. Supp. 360.

²⁴⁰*People ex rel. Giles v. Flagg*, 25 Barb. 652, 15 How. Pr. 36; *Voorhis v. French*, 15 Jones & S. 364, 61 How. Pr. 161; *Wilkinson v. Tiffany*, 4 Abb. Pr. 99.

²⁴¹*People v. Giroux*, 29 Hun, 248.

²⁴²*People ex rel. Winans v. Adams*, 123 N. Y. 129, 21 N. Y. Civ. Proc. Rep. 159, 38 N. Y. S. R. 880, 27 N. E. 1075.

²⁴³*Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 63 Hun, 297, 22 N. Y. Civ. Proc. Rep. 6, 43 N. Y. S. R. 381, 17 N. Y. Supp. 786.
²⁴⁴*De Long v. De Long Hook & Eye Co.* 89 Hun, 399, 70 N. Y. S. R. 161, 35 N. Y. Supp. 509.

²⁴⁵*Folger v. Force*, 63 App. Div. 122, 71 N. Y. Supp. 209; *Coates v. Goddard*, 2 Jones & S. 118; *Spofford v. Texas Land Co.* 9 Jones & S. 228

d. Real actions.—Where the lessee brings an action to compel the lessor to name an umpire to fix the value of buildings erected by the lessee, or to fix the rental value of a new lease, no additional allowance can be granted, as the subject of the action is not capable of a money valuation.²⁴⁶ No allowance can be granted to set aside a deed given for convenience;²⁴⁷ nor in an action to restrain the defendant from proceeding in dispossession proceedings,²⁴⁸ nor to restrain him from increasing the height of a party wall;²⁴⁹ nor to restrain him from erecting buildings within a certain line of the street, although damages were claimed in the complaint, but none were recovered;²⁵⁰ nor to restrain the erection of a building upon land adjoining the plaintiff's premises, in which the plaintiff claimed an easement, unless the value of that easement is proved;²⁵¹ nor in an action to reform a contract and restrain the defendant from running cars over plaintiff's road, where the defendant won;²⁵² nor in an action to restrain the maintenance of a street railway;²⁵³ nor in an action to restrain the execution of a final determination in the proceedings for a forcible entry and detainer;²⁵⁴ nor in an action to restrain the foreclosure of a mortgage;²⁵⁵ nor on a sum fixed as the value of easements in an action to restrain the operation of a railroad;²⁵⁶ nor in an action to restrain a railroad from building upon the route laid out by it, and to compel

²⁴⁶*Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825.

²⁴⁷*Donoran v. Wheeler*, 67 Hun. 68, 51 N. Y. S. R. 411, 22 N. Y. Supp. 54.

²⁴⁸*Grissler v. Stuyvesant*, 67 Barb. 81.

²⁴⁹*Musgrave v. Sherwood*, 29 Hun. 475.

²⁵⁰*Bradley v. Walker*, 28 Jones & S. 324, 22 N. Y. Civ. Proc. Rep. 1, 44 N. Y. S. R. 23, 17 N. Y. Supp. 383.

²⁵¹*Johnson v. Shelter Island Grove & Camp Meeting Asso.* 47 Hun. 374, 28 N. Y. Week. Dig. 59, 14 N. Y. S. R. 576.

²⁵²*Christopher & Tenth St. R. Co. v. Twenty-third St. R. Co.* 48 N. Y. S. R. 805, 20 N. Y. Supp. 556.

²⁵³*Black v. Brooklyn Heights R. Co.* 32 App. Div. 468, 53 N. Y. Supp. 312.

²⁵⁴*Sheehy v. Kelly*, 33 Hun. 543.

²⁵⁵*Sprong v. Snyder*, 6 How. Pr. 11.

²⁵⁶*Bolger v. Metropolitan Elev. R. Co.* 29 Jones & S. 459, 48 N. Y. S. R. 399, 20 N. Y. Supp. 430; *Blumenthal v. New York Elev. R. Co.* 42 N. Y. S. R. 683, 17 N. Y. Supp. 481.

it to take another route;²⁵⁷ nor in an action by the people to compel the defendant to remove a dam, the subject-matter of the litigation being the right of the state to have the water flow unobstructed;²⁵⁸ nor in an action to restrain the continuance of a nuisance in diverting and polluting the water of a stream, where the plaintiff does not seek to recover damages. The only measure of damages in such a case is the damage to the plaintiff, not the difference in the value of the defendant's property as it was at the commencement of the action, and its value should plaintiff succeed.²⁶⁰ Nor should an allowance be granted in an action to restrain the operation of a railroad, where damages to the easement are nominal and the injunction can be obviated by the payment of a gross sum. An allowance cannot be based on this sum.²⁶¹ Nor should an allowance be granted in an action to have a resulting trust declared as to a leasehold interest in property, and the complaint is dismissed.²⁶²

e. Actions for injunctions.—The same rule applies where the subject-matter of the action is injunctive relief in relation to personal property.²⁶³

f. Actions in relation to wills.—In an action to construe a will, where the demurrer of a defendant is sustained there is no basis of an additional allowance. If the defendant had won upon a trial of an issue of fact, there would be a basis. The decision upon the demurrer is simply that the plaintiff has not a right to have the will construed.²⁶⁴ An allowance was refused to

²⁵⁷*People v. Genesee Valley Canal R. Co.* 95 N. Y. 666. 49 App. Div. 423, 63 N. Y. Supp. 383. 29 N. Y. Civ. Proc. Rep. 272.

²⁵⁸*People v. Page*, 39 App. Div. 110. 56 N. Y. Supp. 834. 58 N. Y. Supp. 239. ²⁶³*Diamond Match Co. v. Roeber*, 35 Hun. 421; *Coates v. Goddard*, 2 Jones & S. 118; *Spofford v. Texas Land Co.* 9 Jones & S. 228; *Hanover F. Ins. Co. v. Germania F. Ins. Co.* 63 Hun. 275. 43 N. Y. S. R. 454, 18 N. Y. Supp. 50.

²⁶⁰*Godlen v. Kerr Salt Co.* 3 App. Div. 17, 73 N. Y. S. R. 530, 37 N. Y. Supp. 988.

²⁶¹*Gray v. Manhattan R. Co.* 3 Misc. 239, 51 N. Y. S. R. 905, 22 N. Y. Supp. 771. ²⁶⁴*Opitz v. Hammen*, 41 App. Div. 468, 58 N. Y. Supp. 987.

²⁶²*Werner v. Franklin Nat. Bank*,

the various parties in an action to prove a will, the original not being in the jurisdiction of the court, where all the parties asked for the same judgment.²⁶⁵ In an action for the construction of a will, where he is successful the plaintiff is the only person entitled to an additional allowance.²⁶⁶ The allowance of counsel fees rests in the discretion of the trial court.²⁶⁸ Nor can an allowance be granted in an action to construe a will, where the complaint is dismissed upon the defendant's motion, no evidence having been taken.²⁶⁹

g. Actions for an accounting.—There is no basis for an additional allowance where the plaintiff asks for no sum in his complaint, but asks for an accounting and judgment for such sum as may be found his due, and it appears that there is nothing due him,²⁷⁰ or that he is not entitled to an accounting,²⁷¹ or that the estate is insolvent.²⁷² or where there is no dispute as to the amount due the plaintiff.²⁷³ An additional allowance cannot be granted in an action in which the trustees ask to be relieved from their trust, and subsequently discontinue the action;²⁷⁴ nor in an action to remove a general assignee, and for the appointment of a receiver of the property of the assignor, when the action was discontinued before the trial.²⁷⁵

h. Matrimonial actions.—The court has no power to grant an additional allowance in a divorce action.²⁷⁶

²⁶⁵*Frith v. Campbell*, 53 Barb. 325.

²⁶⁶*West v. Place*, 4 Misc. 19, 23 N. Y. Supp. 1089; *Downing v. Marshall*, 37 N. Y. 380; *Brinckerhoff v. Farias*, 52 App. Div. 256, 65 N. Y. Supp. 358.

²⁶⁸*Wetmore v. Parker*, 52 N. Y. 450.

²⁶⁹*Perkins v. Whitney*, 34 N. Y. S. R. 951, 12 N. Y. Supp. 184.

²⁷⁰*Abell v. Holden*, 39 N. Y. S. R. 5, 15 N. Y. Supp. 64.

²⁷¹*Coleman v. Chauncey*, 7 Robt. 578; *Adams v. Sullivan*, 42 Hun. 278.

²⁷²*Wearer v. Ely*, 83 N. Y. 89; *Patterson v. Burnett*, 1 Silv. Sup. Ct.

166, 17 N. Y. Civ. Proc. Rep. 115, 23 N. Y. S. R. 363, 4 N. Y. Supp. 921.

²⁷³*Hinman v. Ryder*, 12 Jones & S. 330.

²⁷⁴*Knapp v. Hammersley*, 13 N. Y. Civ. Proc. Rep. 258.

²⁷⁵*Meyer v. Rusquin*, 20 N. Y. Week. Dig. 98.

²⁷⁶*Atherton v. Atherton*, 82 Hun. 179, 64 N. Y. S. R. 798, 31 N. Y. Supp. 984; *Van Vleck v. Van Vleck*, 21 App. Div. 274, 631, 47 N. Y. Supp. 470, 472; *Newton v. Newton*, 8 N. Y.

i. Actions in forma pauperis.—An allowance will be refused a plaintiff suing as a poor person, where he has made an agreement with his attorney that he is to have a reasonable compensation.²⁷⁷

j. Various cases.—Nor can an allowance be granted in an action to reform a contract;²⁷⁸ nor in an action brought to obtain some sort of relief in respect to a release, including an injunction against its use;²⁷⁹ nor to vacate an award, where the only controversy is whether the award shall stand.²⁸⁰

312. What is a proper allowance. *a. In general.*—The allowance should be a reasonable and moderate counsel fee under the circumstances of each case. Where the plaintiff sued on nineteen causes of action and recovered over \$3,000, and the defendant had judgment for over \$11,000, an allowance to the plaintiff of 5 per cent of his recovery, and an allowance to the defendant of \$500, was held proper.²⁸¹ In a taxpayer's action to restrain the levying of a tax for the payment of \$300,000 of railroad bonds an allowance of \$700 was held proper.²⁸² Where the plaintiff was allowed \$1,000 in an action to restrain the levying of a tax of \$25,000, this was held proper.²⁸³ In an action upon an assigned claim for \$7,500 the defendant set up a counterclaim for \$20,000 and was allowed \$9,000, but as the plaintiff sued as assignee, no affirmative judgment could be rendered, and an allowance of \$750 was held proper.²⁸⁴

b. Allowances to guardians ad litem.—An allowance granted

Civ. Proc. Rep. 224, note; *Bentley v. Hoffman v. De Graaf*, 39 Hun. 648.
Bentley, 3 Month. L. Bull. 76; *Pountney v. Pountney*, 32 N. Y. S. R. 335, 10 N. Y. Supp. 192; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 263, 1 N. Y. Supp. 537.

²⁷⁷*Marx v. Manhattan R. Co.*, 3 N. Y. Supp. 113.
²⁷⁸*Heert v. Cruger*, 14 Misc. 508, 70 N. Y. S. R. 688, 35 N. Y. Supp. 1063.

²⁷⁹*Husted v. Thomson*, 38 App. Div. 315, 57 N. Y. Supp. 9.
²⁸⁰*Morgan v. Westchester County*, 39 N. Y. S. R. 798, 15 N. Y. Supp. 580.
²⁸¹*Zabriskie v. Central Vermont R. Co.*, 13 N. Y. Supp. 735.

to a guardian *ad litem* is independent of the allowance given under § 3253 of the Code of Civil Procedure, and must not be included in the sum of the allowances in ascertaining whether the allowances exceed the statutory limit of 5 per cent upon the amount involved.²⁸⁵

c. —in taxpayer's actions.—In a taxpayer's action which charged fraud, of which no proof was offered upon the trial, and the complaint was dismissed at the close of the plaintiff's case, an allowance of \$2,000 was reduced to \$500, because the trial was short.²⁸⁶

d. —in actions in relation to wills.—An allowance of \$1,000 to a defendant was reduced to \$250 in an action to declare invalid the probate of a will disposing of an estate of \$200,000, where the complaint was dismissed upon the motion of the defendant. The defendant had not prepared for the trial, but had simply engaged counsel.²⁸⁷

e. —in various cases.—An allowance will be stricken out where the conduct of the party does not commend itself to the court.²⁸⁸ An additional allowance has been denied a defendant who did not succeed upon the answer first interposed, but upon an amended answer served after an adverse decision in the appellate court.²⁸⁹ Where a servant failed in her action against her master for false arrest, an allowance of \$1,000 was set aside as savoring of a punishment for the temerity displayed by the plaintiff in suing the defendant.²⁹⁰

An allowance should not be made to a defendant because the cause of action does not survive the death of the plaintiff, who

²⁸⁵*Roberts v. New York Elev. R. Co.* 12 Misc. 345, 67 N. Y. S. R. 386, 33 N. Y. Supp. 635; *Weed v. Paine*, 31 Hun, 10, 13 Abb. N. C. 200; *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 230, 85.

²⁸⁶*Gordon v. Strong*, 15 App. Div. 519, 44 N. Y. Supp. 481.

²⁸⁷*Seagrist v. Sigrist*, 20 App. Div. 336, 46 N. Y. Supp. 949.

²⁸⁸*Colton v. Morrissy*, 6 N. Y. Week. Dig. 165.

²⁸⁹*Genet v. Delaware & H. Canal Co.* 49 App. Div. 645, 63 N. Y. Supp.

²⁹⁰*Dann v. Wormser*, 38 App. Div.

had a good cause of action.²⁹¹ A trustee ought not to be made to pay an additional allowance, where he defends an action in the interest of others;²⁹² or to settle the right to the fund.²⁹³ An allowance to all the parties, which exceeds 5 per cent of the sum involved, will be reduced to the legal amount of 5 per cent upon the sum involved.²⁹⁴

313. Allowances in special proceedings.—The same limit as to allowances applies in special proceedings as in actions. An allowance in excess of the legal limit will be reduced by the appellate court.²⁹⁵

An extra allowance cannot be made in a special proceeding,²⁹⁶ where the costs are fixed by § 3240 of the Code of Civil Procedure.²⁹⁷ Except in the first and second judicial district in a special proceeding by certiorari to review an assessment under chap. 269 of the Laws of 1880, and acts amending the same, the court may allow an additional allowance. Under § 3372 of the Code of Civil Procedure an additional allowance may be granted to a defendant in a proceeding instituted under the condemnation law. A proceeding taken under other acts, although for the condemnation of property, do not come within the purview of § 3372 of the Code of Civil Procedure, and an allowance cannot be made therein.²⁹⁸

314. Additional allowances as a matter of right.—In certain actions the plaintiff is entitled to certain percentages if he re-

²⁹¹*McKeen v. Fish*, 33 Hun, 28.

²⁹⁶*Re Grade Crossing Comrs.* 20

²⁹²*Graham v. New York Life Ins. & T. Co.* 46 Hun, 261.

App. Div. 271, 46 N. Y. Supp. 1070; *Re Holden*, 126 N. Y. 589, 26 N. Y.

²⁹³*Field v. New York*, 38 Hun, 590.

S. R. 507, 27 N. E. 1063; *Re Simpson*, 26 Hun, 459.

²⁹⁴*New York Breweries Co. v. Nichols*, 55 N. Y. S. R. 179, 25 N. Y.

²⁹⁷*Re Brooklyn*, 148 N. Y. 107, 42 N. E. 413.

Supp. 425; *Fraser v. McNaughton*, 58 Hun, 30, 33 N. Y. S. R. 347, 11

²⁹⁸*Re Brooklyn*, 148 N. Y. 107, 42 N. E. 413.

N. Y. Supp. 384; *Moore v. Appleby*, 108 N. Y. 237, 15 N. E. 377.

²⁹⁵*Hynes v. McDermott*, 14 Daly, 104, 3 N. Y. S. R. 582.

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covers costs. These allowances are contained in § 3252 of the Code of Civil Procedure, which is as follows: "Where the action is brought to foreclose a mortgage upon real property, or for the partition of real property, or to procure an adjudication upon a will or other instrument in writing, or to compel the determination of a claim to real property, or where, in any action, a warrant of attachment against property has been issued, the plaintiff, if a final judgment is rendered in his favor, and he recovers costs, is entitled to recover, in addition to the costs prescribed in the last section, the following percentages, to be estimated upon the amount found to be due upon the mortgage; or the value of the property partitioned, affected by the adjudication upon the will or other instrument, or the claim to which is determined; or the value of the property attached, not exceeding the sum recovered or claimed; as the case may be:

"Upon a sum not exceeding \$200, 10 per cent.

"Upon an additional sum not exceeding \$400, 5 per cent.

"Upon an additional sum not exceeding \$1,000, 2 per cent.

"Where such an action is settled before judgment, the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement, at one half of those rates. In an action to foreclose a mortgage upon real property, where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, as prescribed in § 1637 of this act, the percentages specified in this section must be computed upon the whole sum unpaid upon the mortgage. But if it directs the sale of a part only, as prescribed in § 1636 of this act, they must be computed upon the sum actually due; and if the court thereafter grants an order, directing the sale of the remainder, or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not exceed the sum which would have been allowed if the entire sum secured by the mortgage had been due when final judgment was

rendered." These allowances are a matter of right to the plaintiff if he recovers costs. No motion or order is necessary, and the clerk must tax these allowances as of course.²⁹⁹ These allowances can be taxed only by the plaintiff.³⁰⁰ But he must recover costs to be entitled to tax these allowances.³⁰¹

These allowances cannot be taxed in any cases other than those mentioned in the statute. The words "to compel the determination of a claim to real property" have a definite meaning, and refer only to an action in which the parties must assert their claim to the real property or be barred from asserting any claim to that property in the future.³⁰² An allowance cannot be taxed in an action to foreclose a mechanic's lien,³⁰³ nor to compel the specific performance of a land contract,³⁰⁴ nor to restrain the foreclosure of a mortgage,³⁰⁵ nor to set aside a conveyance as fraudulent.³⁰⁶

315. Additional allowances in attachment actions.—The allowance granted in attachment actions under § 3252 of the Code of Civil Procedure can be taxed only when the property is attached,³⁰⁷ or where the attachment is issued and is not set aside pending the action.³⁰⁸ Where an attachment is vacated upon the defendant giving a bond, the allowance is properly computed upon the amount of the bond, which took the place of the property.³⁰⁹

The amount of the recovery is not the value of the property

²⁹⁹*Hunt v. Middlebrook*, 14 How. Pr. 200.

³⁰⁰*Devlin v. New York*, 15 Abb. Pr. N. S. 31.

³⁰¹*Williams v. Hernon*, 13 Abb. Pr. 297; *Hotaling v. Marsh*, 14 Abb. Pr. 161, Reversing 13 Abb. Pr. 297; *Downing v. Marshall*, 37 N. Y. 380.

³⁰²*Wright v. Reusens*, 39 N. Y. S. R. 802, 15 N. Y. Supp. 590.

³⁰³*Randolph v. Foster*, 3 E. D. Smith, 648, 4 Abb. Pr. 262.

³⁰⁴*Weeks v. Southwick*, 12 How. Pr. 170.

³⁰⁵*Sprong v. Snyder*, 6 How. Pr. 11, N. Y. Code Rep. N. S. 178.

³⁰⁶*Buchanan v. Morrell*, 6 Duer, 658, 13 How. Pr. 296.

³⁰⁷*Fisher v. English*, 4 Month. L. Bull. 37.

³⁰⁸*Iselin v. Graydon*, 26 How. Pr. 95.

³⁰⁹*Hannover Nat. Bank v. Linneworth*, 7 Hun, 235; *Woodward v. Grier*, 2 E. D. Smith, 51, 2 N. Y. Code Rep. 13; *Jackson v. Figaniere*, 15 How. Pr. 224; *Pratt v. Conkey*, 15 How. Pr. 27.

attached within § 3252 of the Code of Civil Procedure. Where the sheriff does not make a return with customary appraisal of value, the defendant should show, by affidavit or otherwise, the value of the property attached. Where the property attached exceeds in value the amount of the recovery, the allowance should be computed upon the amount of the recovery.³¹⁰ Discontinuance upon the payment of costs in an attachment action entitles the plaintiff to include a full allowance.³¹¹ The plaintiff has no right to this allowance in attachment, unless he recovers a judgment, or there is a settlement which recognizes that he would be entitled to a judgment.³¹²

³¹⁰*Fetchman v. Davenport*, 8 N. Y. Civ. Proc. Rep. 220, note; *Brace v. Bostwick v. Tioga R. Co.* 17 How. Beatty, 5 Abb. Pr. 221.

³¹²*Pratt v. Conkey*, 15 How. Pr. 27; Pr. 456. *Contra, Gelpeck v. Leather*

³¹¹*Brown v. Safeguard Ins. Co.* 7 Cloth Co. 12 Abb. Pr. 361, note. Abb. Pr. 345.

CHAPTER XXV.

SEVERAL CAUSES OF ACTION: DIFFERENT PLAINTIFFS OR DEFENDANTS ENTITLED TO DIFFERENT RELIEF.

316. When several causes are united in one action.

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b. What recovery the defendant must have to entitle him to costs.

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320. When costs are allowed against a codefendant.

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322. Costs where plaintiff recovers judgment against all the defendants.

316. When several causes are united in one action. *a. Statute.*—Section 3234 of the Code of Civil Procedure is as follows: “In an action specified in § 3228 of this act, wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case the plaintiff only is entitled to costs. Costs to which a party is so entitled must be included in the final judgment by adding them to, or offsetting them against, the sum awarded to the prevailing party, or otherwise, as the case requires, but this section does not entitle a plaintiff to costs in a case specified in subd. 4 of § 3228 of this act, where he is not entitled to costs, as prescribed in that subdivision.”

b. What recovery the defendant must have to entitle him to costs.—To entitle the defendant to costs in an action where the complaint sets up two or more causes of action, and the plaintiff does not recover on all, but the defendant recovers on one or more, there must be an affirmative verdict on the merits for the defendant, so that it will be a bar to another action on the same cause of action. A failure of proof on the part of the plaintiff¹ or a direction of nonsuit by the court is not sufficient.² If an action is brought to recover two different things, for each of which an action might be maintained, but the complaint states but one cause of action, and the plaintiff succeeds as to one or more and the defendant succeeds as to one or more, the plaintiff alone is entitled to costs. The complaint must set forth separately two or more causes of action to permit the defendant to recover costs when he succeeds as to a part of the matter at issue.³ Where the defendant has an affirmative verdict or finding in his favor on the merits upon any of the causes of action set forth in the complaint, he is entitled to costs, although the plaintiff is entitled to judgment on other causes of action.⁴

¹*Reilly v. Lee*, 33 App. Div. 201, Supp. 508; *McCarthy v. Innis*, 61 28 N. Y. Civ. Proc. Rep. 170, 6 N. Y. Hun, 354, 21 N. Y. Civ. Proc. Rep. Anno. Cas. 136, 53 N. Y. Supp. 336, 333, 40 N. Y. S. R. 682, 15 N. Y.

²*Burns v. Delaware, L. & W. R. Co.* Supp. 855, 135 N. Y. 268, 48 N. Y. S. R. 106. ³*Newell Universal Mill Co. v. Mur-*
31 N. E. 1080; *Heath v. Forbes*, 18 *low*, 115 N. Y. 170, 17 N. Y. Civ.
N. Y. Civ. Proc. Rep. 207, 11 N. Y. Proc. Rep. 238, 24 N. Y. S. R. 545,
Supp. 87; *Cooper v. Jolly*, 30 Hun, 21 N. E. 1048. In effect overruling
224, Affirmed in 96 N. Y. 667; *Briggs Coon v. Diefendorf*, 8 N. Y. Civ. Proc.
v. Allen, 4 Hill, 538; *Williard v.* Rep. 293, 2 How. Pr. N. S. 389. The
Strachan, 3 N. Y. Civ. Proc. Rep. latter case was based very largely
452; *Cresley v. Cobb*, 42 Hun, 166; upon *Ackerman v. De Lude*, 36 Hun,
Reed v. Batten, 17 N. Y. Civ. Proc. 44, which was expressly overruled in
Rep. 272, 6 N. Y. Supp. 708, not the principal case. *Barlow v. Bar-*
following *Blashfield v. Blashfield*, 41 *low*, 35 Hun, 50; *Bull v. Ketchum*, 2
Hun, 249; *Durant v. Abendroth*, 13 Denio, 188.

N. Y. Civ. Proc. Rep. 434; *Crittenden* ⁴*Welling v. Iroroyd Mfg. Co.* 15
v. Crittenden, 1 Hill, 359; *People v.* App. Div. 116, 4 N. Y. Anno. Cas.
Feeter, 12 Wend. 480; *Quinby v.* 145, 44 N. Y. Supp. 374; *McCarthy*
Claflin, 39 N. Y. S. R. 793, 15 N. Y. *v. Innis*, 61 Hun, 354, 15 N. Y. Supp.

Costs awarded to both parties in the same action should be set off against each other and judgment entered for the difference.⁵ Where a plaintiff set forth in her complaint three causes of action to recover the same premises, claiming a dower interest in the first count, and in fee in the other two, and she won on the first, the defendant was held entitled to costs.⁶ Where a plaintiff sets forth three causes of action, claiming a different fractional part of the same property in each count, and each count requires the same proof, but they differ from one another to meet the uncertain views of the jury upon a conflict of the evidence, or the opinion of the court upon some question of law, the defendant is not entitled to costs where the plaintiff recovers on only one of the counts.⁷ Section 3234 of the Code of Civil Procedure is substantially the same as 2 Rev. Stat. 617, § 26 (2 Edm. 641); therefore cases decided under the Revised Statute are applicable to the law at the present time. When the Code of Procedure was enacted, this provision was repealed, and was not incorporated therein. Decisions rendered while the Code of Procedure was in force are, therefore, not now applicable.⁸ Where the complaint is amended at the trial so that the plaintiff may recover on all the causes of action set forth, the defendant is not entitled to costs, although he would have succeeded upon the issues presented by the original pleadings.⁹

c. Action in conversion to recover several chattels.—Where an

855; *Cooper v. Jolly*, 30 Hun, 224, *Hudson v. Guttenberg*, 9 Abb. N. C. 415.
 v. *Metropolitan L. Ins. Co.* 3 App. ⁵*Genet v. Delaware & H. Canal Co.*
 Div. 314, 38 N. Y. Supp. 258; *Crane* 136 N. Y. 217, 49 N. Y. S. R. 201,
 v. *Miller*, 27 App. Div. 630, 50 N. Y. 32 N. E. 851.
 Supp. 675; *Browning v. New York*, ⁶*Crittenden v. Crittenden*, 1 Hill,
 L. E. & W. R. Co. 64 Hun, 513, 22 359.
 N. Y. Civ. Proc. Rep. 193, 46 N. Y. ⁷*Martin v. Martin*, 3 How. Pr. 202.
 S. R. 505, 19 N. Y. Supp. 453; *Blash-* ⁸*Watson v. Gardiner*, 50 N. Y. 671;
field v. Blashfield, 41 Hun, 249; *Ury* *Stoddard v. Clarke*, 9 Abb. Pr. N. S.
 v. *Wilde*, 15 N. Y. Civ. Proc. Rep. 310.
 451, 19 N. Y. S. R. 674, 3 N. Y. Supp. ⁹*Dougherty v. Metropolitan L. Ins.*
 791; *Moosbrugger v. Kaufman*, 7 Co. 3 App. Div. 313, 73 N. Y. S. R.
 App. Div. 380, 40 N. Y. Supp. 213; 739, 38 N. Y. Supp. 253.

action is brought to recover several chattels, and the complaint states but one cause of action, if the plaintiff recovers property of the value of more than \$50, the defendant is not entitled to costs. The complaint must set forth separately two or more causes of action, to permit the defendant to recover costs when he succeeds as to a part of the property.¹⁰ The defendant is not without protection in such a case, as he can make an offer of judgment which will protect him as to future costs.¹¹

d. When the action is in equity.—In equity, costs may be refused to both parties, where each party recovers on one or more causes of action.¹² The certificate mentioned in § 3234 of the Code of Civil Procedure is meant to cover those cases where the pleader has set forth the same cause of action in several different ways, and not two distinct causes of action in which the same legal conclusion arises.¹³

317. Where two actions are tried together.—Where two actions at law are tried together, and it is stipulated that one action shall abide the event of the other a full bill of costs can be taxed in each case, including a trial fee.¹⁴ It was held that, where parties stipulated that a certain action be stayed till the determination of another action, and that the result in the latter case be adopted as final in the former case, and that either party have a right to enter judgment therein the same as if a trial had been had therein, the successful party was entitled to costs up

¹⁰*Kilburn v. Lowe*, 37 Hun, 237; *McDonald*, 9 Hun, 23; *Hudson v. Newell Universal Mill Co. v. Mux-Guttenberg*, 9 Abb. N. C. 415; *Barker v. Lancy*, 7 App. Div. 352, 40 N. Y. Proc. Rep. 238, 24 N. Y. S. R. 545, Supp. 66.

¹¹*Teator v. New York Mut. Sav. & Loan Asso.* 32 Misc. 542, 67 N. Y. Proc. Rep. 272, 6 N. Y. Supp. 708.

¹²*Reed v. Batten*, 22 Abb. N. C. 69, Supp. 15.

¹³*Tucker v. Utica*, 35 App. Div. 502; *Hauselt v. Godfrey*, 3 N. Y. Civ. Proc. Rep. 116; *Law v. Jackson ex dem. Lansing*, 2 Wend. 209.

¹⁴*Koch v. Koch*, 1 City Ct. Rep. 255; *Hildebrandt v. Crawford*, 6 Lans. 502; *Hauselt v. Godfrey*, 3 N. Y. Civ. Proc. Rep. 116; *Law v. Jackson ex dem. Lansing*, 2 Wend. 209.

to the time of the stipulation, and a trial fee.¹⁵ Costs in such cases follow the right to a judgment, unless the parties, by stipulation, have waived their right to costs. Where a plaintiff brings several actions to recover for the same cause of action, and recovers damages, he is entitled to a full bill of costs in one action and his disbursements in the others.¹⁶ In equity the court will make such an allowance of costs as justice requires, in spite of the stipulation of the parties. In such actions there is no absolute right to costs, and parties cannot, by stipulation, take away from the court its right to exercise its discretion. Where four tenants in common brought four separate actions for an injunction, or damages to their property, which actions were tried as one, and but one record upon appeal was made, but one bill of costs was allowed, because they could all have joined in one action.¹⁷

A plaintiff was allowed two bills of costs where he brought two actions upon two separate judgments to set aside a transfer as being in fraud of creditors, and succeeded in his actions.¹⁸

Where several plaintiffs brought an action against the defendant for damages which accrued to them severally, the plaintiff who won was held entitled to costs, and the defendant was held entitled to costs against the plaintiffs he defeated. The defendant should enter one judgment against all of the unsuccessful plaintiffs. The remedy where he fails to do this is to apply to the court to correct this irregularity, and not to move to set the judgment aside.¹⁹

318. Where the plaintiff wins against some of the defendants and loses as to others. *a. In general.*—In an action at law against several defendants, where the plaintiff succeeds against

¹⁵*Audenreid v. Wilson*, 2 N. Y. Co. 22 App. Div. 501, 48 N. Y. Supp. Week. Dig. 103. 80.

¹⁶*Moosbrugger v. Kaufman*, 7 App. Div. 380, 40 N. Y. Supp. 213; *Quin v. Bouce*, 11 Abb. N. C. 115, 10 Daly, 493. 505.

¹⁸*Clark v. MacDonald*, 62 Hun. 149.

¹⁷*Woodworth v. Brooklyn Elev. R.* 361.

one or more defendants, but not against all, he is entitled to costs, as of course. In such a case costs may be awarded to the successful defendants in the discretion of the trial court, in actions at law or in equity, and upon application to it.²⁰ The application must be made to the court, although the action is tried before a referee.²¹

To entitle a defendant to costs against the plaintiff in such cases it must appear that he did not unite in an answer and was not united in interest with a defendant against whom the plaintiff was entitled to costs.²²

b. Where all the defendants have the same attorney.—It is fatal to the rights of a successful defendant that he has united in an answer with an unsuccessful defendant.²³ In such a case the direction of the court that he have costs is of no avail. The court has no power to award him costs.²⁴ It has been held that if they answer separately, setting up different defenses, but by the same attorney, it is sufficient to allow the successful defendant costs.²⁵ Where the summons is served on the defendants at such long intervals that the attorney for both defendants is compelled to serve separate answers, it is proper to allow the defendants, upon their succeeding in the action, two bills of costs.²⁶ Where the successful defendant is allowed costs, he can

²⁰*Van Gelder v. Van Gelder*, 84 N. Y. Week. Dig. 390; *Churchill v. Y.* 658; *Williams v. Blumer*, 49 How. *Wagner*, 23 Misc. 595, 52 N. Y. Supp. Pr. 12; *Marks v. Bard*, 1 Abb. Pr. 252.

63; *Williams v. Horgan*, 13 How. Pr. 138; Code Civ. Proc. § 3229; *Allis v. Wheeler*, 56 N. Y. 50; *Husted v. Van Ness*, 1 App. Div. 120, 72 N. Y. S. R. 28, 36 N. Y. Supp. 1043; *Pixley v. Rockwell*, Sheldon, 267; *Hauselt v. Vilmar*, 76 N. Y. 630.

²¹*New York Elcr. R. Co. v. Philadelphia Architectural Iron Co.* 18 N. Y. Week. Dig. 325.

²²Code Civ. Proc. § 3229; *Allis v. Wheeler*, 56 N. Y. 50; *Park v. Spaulding*, 10 Hun. 128.

²³*Saenger v. Thurber*, 14 N. Y. Civ. Proc. Rep. 204; *Frazer v. Hunt*, 18

²⁴*Krafft v. Wilson*, 3 How. Pr. N. S. 18, 8 N. Y. Civ. Proc. Rep. 359; *Downing v. Marshall*, 37 N. Y. 389; *Allis v. Wheeler*, 56 N. Y. 50; *Park v. Spaulding*, 10 Hun. 128.

²⁵*Pierce v. Brown*, 8 Jones & S. 398; *Hodgkins v. Mead*, 17 N. Y. Civ. Proc. Rep. 16, 25 N. Y. S. R. 937, 5 N. Y. Supp. 435; *Wheeler v. Heermans*, 3 Sandf. Ch. 597; *Zeisler v. Steinmann*, 21 Jones & S. 184; *Walker v. Russell*, 16 How. Pr. 91, 7 Abb. Pr. 452, note.

²⁶*Mazet v. Crow*, 24 Abb. N. C. 374, 18 N. Y. Civ. Proc. Rep. 178, 31 N.

tax a full bill of costs, although the plaintiff is limited in the amount of his costs against the unsuccessful defendant to a sum equal to the verdict.²⁷

If one bill of costs is awarded to two successful defendants, and upon the appeal the judgment is affirmed, as to one, without costs, but reversed as to the other, with costs to abide the event, the successful defendant may collect the costs awarded to both defendants, and may maintain an action on the bond given to both upon appeal.²⁸ The defeated defendant is not a necessary party to such an action. When the judgment was reversed, the defeated defendant ceased to have any interest in the costs or to the undertaking on appeal.²⁹ There can be no doubt whatever that these costs are not given as of course, and there seems to be no good reason why they should not be awarded to a successful defendant, who is not united in interest and does not unite in an answer with an unsuccessful defendant, but employs the same attorney. Under the Code of Procedure the successful defendants were entitled to costs against the plaintiff, as of course.³⁰ The old Code also allowed costs to each successful defendant who put in a separate answer, although they all had the same attorney.³¹

c. Where the defendants appear by different attorneys.—A defendant who is not united in interest with the other defendants, and appears by separate attorney, will usually be allowed his costs in case he succeeds, whether the other defendants succeed or not.³² If the attorney for one of the defendants with-

Y. S. R. 972, 10 N. Y. Supp. 743; ²⁷*Daniels v. Lyon*, 9 N. Y. 549; *Lindsay v. Deasendorf*, 43 How. Pr. *Gardner v. Walker*, 22 How. Pr. 405.
90.

³¹*Pierce v. Brown*, 8 Jones & S.

²⁷*Stone v. Duffy*, 3 Sandf. 761, N. 398.

Y. Code Rep. N. S. 129.

³²*Forrest v. Thompson*, 8 N. Y. S.

²⁸*Fritchie v. Holden*, 19 N. Y. Civ. R. 345; *Lane v. Van Orden*, 11 Abb. Proc. Rep. 84, 32 N. Y. S. R. 276, 11 N. C. 228, 63 How. Pr. 237; *Royce v. Jones*, 23 Hun, 452; *Delaware, L.*

²⁹*Johnstone v. Conner*, 13 N. Y. & W. R. Co. v. *Burkard*, 40 Hun, 625, Civ. Proc. Rep. 19, 10 N. Y. S. R. 702. 2 N. Y. S. R. 184; *Hinds v. Myers*,

draws from the case upon appeal, he will not be allowed costs after such withdrawal.³³ The right to separate bills of costs on the part of the defendants is determined by the manner in which they answer the complaint. The fact that they appear by different attorneys upon an appeal cannot change their right to costs, as determined by their appearance in the trial court.³⁴

If separate bills of costs are awarded, only one judgment should be entered and the disbursements in the bills of costs should not be duplicated.³⁵ There can be only one judgment if the plaintiff wins as to one defendant and loses as to the other.³⁶

Costs will not be awarded to several defendants who have appeared by separate attorneys, when the severance is made for the purpose of increasing costs.³⁷ Where a complaint is dismissed upon the call of the calendar on the ground that it does not state a cause of action, only one bill of costs will be allowed to several defendants who appeared by separate attorneys. The complaint being clearly insufficient the court could have passed upon the question upon a joint demurrer.³⁸ The burden rests upon the plaintiff to show that the severance was made for the purpose of increasing the costs.³⁹ It is usually fatal to an allowance to the successful defendant of a separate bill of costs to the several defendants, that the attorneys who appear for the several defendants are partners,⁴⁰ or that one of the attorneys

4 How. Pr. 356, 3 N. Y. Code Rep. *Lindsay v. Hufendorf*, 43 How. Pr. 48; *Decker v. Gardiner*, 8 N. Y. 29; 90; *New York & N. H. R. Co. v. New York & N. H. R. Co. v. Schuyler*, 29 How. Pr. 89; *Slater* 29 How. Pr. 89; *Olifiers v. Belmont*, *Bank v. Sturdy*, 15 Abb. Pr. 75. 15 Misc. 120, 71 N. Y. S. R. 836. 36 ³⁵*Bailey v. Johnson*, 1 Daly, 61. N. Y. Supp. 813; *Hequembourg v. Bookstaver*, 54 Hun, 88, 26 N. Y. S. R. 479, 7 N. Y. Supp. 217. ³⁸*Delaware, L. & W. R. Co. v. Burkard*, 40 Hun, 625; *Wolf v. Di Lorenzo*, 22 Misc. 323, 49 N. Y. Supp. 191; *Pickert v. Windecker*, 73 Hun, 476, 56 N. Y. S. R. 12, 26 N. Y. Supp. 437; *Forrest v. Thompson*, 8 N. Y. S. R. 345.

³³*Wheatland v. Taylor*, 20 N. Y. Week. Dig. 33.

³⁴*Wilbur v. Wiltsey*, 13 How. Pr. 506.

³⁵*Ten Broeck v. Paige*, 6 Hill. 267.

³⁶*Webb v. Bulger*, 4 Hill. 588.

³⁷*Royce v. Jones*, 23 Hun, 452;

³⁹*Crofts v. Rockefeller*, 6 How. Pr. 9, N. Y. Code Rep. N. S. 177; *Brockway v. Jewett*, 16 Barb. 590.

is a clerk for the other attorney,⁴¹ or that the attorneys occupy the same office,⁴² or that one attorney was retained by the attorney for another defendant.⁴³ Defendants who are partners, or who were partners at the time the liability was incurred, will not usually be allowed separate bills of costs; but where their relations are now hostile, or they reside at a distance from each other and the court can see that their appearance by different attorneys is not made to oppress the plaintiff, but to protect their own interests, separate bills of costs will usually be allowed.⁴⁴ The fact that the defendants ceased to be partners before the liability was incurred is usually sufficient to place the burden on the plaintiff to show that the severance was collusive.⁴⁵ Where one bill of costs is allowed to two defendants, and one of the defendants enters up judgment taxing the entire bill of costs, the other defendant cannot enter up judgment taxing another bill of costs. Only one final judgment can be entered in an action. If the one already entered is not proper, it should be corrected on motion.⁴⁶

Where, after service of the answer, one attorney withdraws and another attorney appears for his client and all the other defendants, costs will usually be allowed to the client whose attorney withdrew, up to such withdrawal, and a full bill of costs will be allowed for the services of the other attorney.⁴⁷ The plaintiff can tax but one bill of costs where he succeeds as to all the defendants, although they have appeared by different attorneys.⁴⁸ Where the plaintiff accepts separate offers of judg-

⁴¹*Howell v. Veith*, 2 N. Y. City Ct. Rep. 405; *Perry v. Livingston*, 6 How. Pr. 404.

⁴²*Slater Bank v. Sturdy*, 15 Abb. Pr. 75.

⁴³*Williams v. Cassady*, 22 Hun. 180, 59 How. Pr. 490.

⁴⁴*Bridgeport F. & M. Ins. Co. v. Wilson*, 7 Bosw. 699, 12 Abb. Pr. 209, 20 How. Pr. 511.

⁴⁵*Milligan v. Robinson*, 58 How. Pr. 380.

⁴⁶*Arnow v. Ferguson*, 50 N. Y. S. R. 509, 21 N. Y. Supp. 195.

⁴⁷*Castellanos v. Beauville*, 2 Sandf. 670; *Harper v. Chamberlain*, 14 Abb. Pr. 408.

⁴⁸*Latham v. Bliss*, 13 How. Pr. 416; *Codding v. Scott*, 1 Misc. 485, 49 N. Y. S. R. 884, 21 N. Y. Supp. 473; *Mcmechanics' & T. Nat. Bank v. Winant*, 16 N. Y. S. R. 904, 1 N. Y. Supp. 659; *Phipps v. Van Cott*, 15 How. Pr. 110; *Ererson v. Gehrman*,

ment made by the defendants, and then obtains an order severing the action, he is only entitled to one bill of costs.⁴⁹ Under the old civil damage act, judgments could be taken against the defendants in different amounts, and separate bills of costs could be taxed against them.⁵⁰ The order of the judge granting or refusing separate bills of costs, or awarding costs to certain defendants and refusing them to others, is final until reversed, and a judgment entered contrary to such order will be set aside as irregular.⁵¹ Costs may be awarded to the several defendants at any time after judgment, and where the plaintiff moves to set aside the costs taxed by the separate defendants on the ground that none had been allowed, the court, upon the hearing of the motion, has power to finally dispose of the question of costs.⁵²

d. Costs on appeal.—Where all the defendants unite in one appeal and the judgment is reversed, with costs to the appellants, only one bill of costs can be taxed,⁵³ although the court below had granted the defendants separate bills of costs.⁵⁴

319. When costs are allowed upon the successful plea of infancy.—A defendant who succeeds in establishing his plea of infancy is entitled to the same costs as if he had succeeded upon any other defense where costs are a matter of right, and in an action where costs are in the discretion of the court he may be allowed costs if he establishes that fact on the trial.⁵⁵ If the plaintiff had wished to avoid paying costs, he should have moved to discontinue when the answer was served, and not forced the defendant to establish his defense.⁵⁶ If the plaintiff is allowed

2 Abb. Pr. 413; *Buell v. Gay*, 13 How. Pr. 31.

⁴⁹*Codding v. Scott*, 1 Misc. 485, 49 N. Y. S. R. 884, 21 N. Y. Supp. 473.

⁵⁰*McIntyre v. Wynne*, 21 N. Y. Civ. Proc. Rep. 208, 16 N. Y. Supp. 540; *Comstock v. Halleck*, 4 Sandf. 671; *Buell v. Gay*, 13 How. Pr. 31, *contra*.

⁵¹*Arnow v. Ferguson*, 5 Silv. Sup. Ct. 237, 8 N. Y. Supp. 715.

⁵²*Andrews v. Moller*, 20 N. Y. Week. Dig. 377.

⁵³*Von Keller v. Schulting*, 45 How. Pr. 139.

⁵⁴*Sweet v. Mourry*, 49 N. Y. S. R. 262, 20 N. Y. Supp. 294, Affirmed in 138 N. Y. 650, 53 N. Y. S. R. 87, 34 N. E. 388; *Fischer v. Langbein*, 31 Hun. 272.

⁵⁵*Wilklow v. Bell*, 18 How. Pr. 397; *Bank of Attica v. Wolf*, 18 How. Pr. 102; *Zink v. Attenburg*, 18 How. Pr. 108.

⁵⁶*Cuyler v. Coats*, 10 How. Pr. 141;

to proceed to trial without notice of infancy the court may well, where costs are in its discretion, refuse to allow costs,⁵⁷ or it may refuse costs where the defendant escapes a moral liability upon such a plea.⁵⁸

320. When costs are allowed against a codefendant.—Costs will not be awarded to one defendant against a codefendant, unless he is a necessary party to the action,⁵⁹ and it becomes necessary in the adjustment of the ultimate rights of the parties.⁶⁰

321. Rights and liability of codefendants when one suffers default and the other contests the action.—A defendant who successfully defends an action at law, while his codefendant makes default, is not entitled to costs, as of course, but his costs are discretionary with the court under § 3229, of the Code of Civil Procedure. This has been the law since 1851. Before that time he would have been entitled to costs, as of course.⁶¹ A defendant who makes default is liable for the costs incurred by his codefendant in his unsuccessful efforts in defending the action.⁶² Where one of two or more defendants suffers default, the plaintiff may enter up judgment against him, with costs; but if the plaintiff does not do this, but waits until the issues of the action have been determined, and enters up judgment against all the defendants, his rights against the defaulting defendant under that judgment cease upon the reversal of that judgment by the appellate court. The plaintiff, however, may, upon proper proof, enter up against the defaulting defendant the same judg-

Hinds v. Myers, 4 How. Pr. 356, 3 N. Y. Anno. Cas. 18, 63 N. Y. S. Y. Code Rep. 48. R. 149, 30 N. Y. Supp. 895; *Allis v.*

⁵⁷*Irwin v. O'Connor*, 15 N. Y. *Wheeler*, 56 N. Y. 50; *Royce v. Jones*, 23 Hun. 453; *Yamato Trading Co. v.*

⁵⁸*Yamato Trading Co. v. Hoexter*, *Hoexter*, 44 Hun. 491; *Daniels v. Lyon*, 9 N. Y. 549 (commenced before 1851).

⁵⁹*Roberts v. New York Elev. R. Co.* 155 N. Y. 31, 49 N. E. 262. ⁶⁰*Cutlin v. Billings*, 4 Abb. Pr. 248,

⁶¹*People v. Albany & S. R. Co.* 5 13 How. Pr. 511; *Warner v. Ford*, Lans. 25; *Budd v. Munroe*, 18 Hun, 17 How. Pr. 54; *Delatour v. Bricker*, 2 N. Y. City Ct. Rep. 22.

⁶²*Eastman v. Gray*, 81 Hun. 362,

ment that he might have entered up as soon as the default occurred. He may do this at any time, even after the contesting defendants have obtained final judgment against him.⁶³ Where one of two or more defendants pays the judgment and costs taken against all the defendants, and the other defendant upon appeal subsequently obtains a new trial, with costs to the defendant to abide the event, all questions of accrued costs is at an end. If the successful defendant obtains leave of the court to set up payment by his codefendant, he will, upon proving payment, be entitled to the entire costs of the action.⁶⁴ Where one defendant demurs and one answers, and the plaintiff is successful in both cases, he is entitled to but one bill of costs, with disbursements, in the trial court, but to two bills of costs in the appellate court.⁶⁵

322. Costs where plaintiff recovers judgment against all the defendants.— Where there are two or more defendants who appear by different attorneys, and the plaintiff recovers judgment against all of them, he is entitled to tax but one bill of costs.⁶⁶ There are two decisions to the contrary. One was decided in 1851 under the Code of Procedure and is now of very little authority.⁶⁷ The other case was an action under the civil damage act, where the action was brought against the liquor dealer and his landlord. The jury was instructed that they might bring in a verdict in different amounts against the two defendants. Such a verdict was rendered, and the court held that separate judgments, with full costs against each, might be entered.⁶⁸ These cases do not change the rule as above stated.

⁶³*Howk v. Bishop*, 10 Hun. 509. *nant*, 16 N. Y. S. R. 902, 1 N. Y.

⁶⁴*Brown v. Richardson*, 7 Robt. 57. Supp. 659; *Pratt v. Allen*, 19 How.

⁶⁵*Pratt v. Allen*, 19 How. Pr. 450. Pr. 450.

⁶⁶*Buell v. Gay*, 13 How. Pr. 31; ⁶⁷*Comstock v. Halleck*, 4 Sandf. *Codding v. Scott*, 1 Misc. 485, 49

N. Y. S. R. 884, 21 N. Y. Supp. 473; ⁶⁸*McIntyre v. Wynne*, 21 N. Y. Civ. *Mechanics' & T. Nat. Bank v. Wi-* Proc. Rep. 208, 16 N. Y. Supp. 540.

CHAPTER XXVI.

VARIOUS PROVISIONS IN RELATION TO COSTS.

- 323. Costs on consolidation of two or more actions.
- 324. Costs on severance of an action.
 - a. Statute.
 - b. In general.
 - c. Severance after answer.
- 325. Costs upon granting an order of interpleader.
- 326. Costs as affected by lack of jurisdiction.
- 327. Costs as governed by stipulation.
- 328. Commencement of an action without authority.
- 329. When the judge informs the jury of the effect of their verdict upon the question of costs.
- 330. Costs after entry of judgment.
- 331. Costs upon an accounting.
- 332. When costs are made payable out of a fund.
- 333. Costs payable a guardian *ad litem*.
 - a. Costs allowed to a guardian *ad litem*.
 - b. Amount.
- 334. Costs allowed against a general guardian.
- 335. Costs in various cases.
- 335a. Voluntary appearance.

323. Costs on consolidation of two or more actions.—When two or more actions are consolidated under the provisions of § 817 of the Code of Civil Procedure, they are at an end, and only the consolidated action remains. No costs in those actions can be taxed upon the final judgment, unless it is so provided in the order of consolidation.¹ If the order does not provide for the costs already accrued, the party feeling aggrieved should appeal; otherwise, he is concluded by the order.² If a consolidated action is settled after the amended complaint and answer

¹*Blake v. Michigan S. & N. I. R.* ²*Train v. Davidson*, 11 App. Div. Co. 17 How. Pr. 228; *German Exch.* 627, 42 N. Y. Supp. 1133; *Wm. H. Bank v. Kroder*, 14 Misc. 179, 35 N. Y. Supp. 389; *Frank Brewing Co. v. New York*, 19 App. Div. 628, 46 N. Y. Supp. 24.
2 N. Y. City Ct. Rep. 338.

have been served, and before it is placed upon the calendar, only costs before notice of trial can be taxed, although the original actions may have been on the calendar.³ Costs of the motion of consolidation should be granted, unless a satisfactory reason is shown for bringing two actions.⁴

324. Costs on severance of an action. *a. Statute.* — Section 3231 of the Code of Civil Procedure provides for costs when the plaintiff brings several actions upon the same claim, and is as follows: "Where two or more actions are brought, in a case specified in § 454 of this act, or otherwise for the same cause of action, against persons who might have been joined as defendants in one action, costs, other than disbursements, cannot be recovered upon the final judgment, by the plaintiff, in more than one action, which shall be at his election. But this prohibition does not apply to a case where the plaintiff joins, as defendants, in each action brought, all the persons liable, not previously sued, who can, with reasonable diligence, be found within the state; or if the action is brought in the city court of the city of New York, or a county court, within the city or county, as the case may be, where the court is located."

b. In general.—Where the plaintiff brings several actions against several defendants, when one action would have sufficed, he can recover costs, other than disbursements, in but one action.⁵ This applies to actions for torts, as well as to actions on contract.⁶ It does not apply to a case where, upon the motion of one defendant, the complaint is dismissed as to him, but the plaintiff succeeds in reversing that order and ultimately obtains judgment against both defendants in separate actions.⁷ Where a plaintiff brings two actions upon two separate judgments to

³*Hiscox v. New Yorker Staats-Zeitung*, 3 Misc. 110, 30 Abb. N. C. 19 How. Pr. 450.

⁴*Quin v. Bowe*, 10 Daly, 505, 11 N. Y. S. R. 212, 23 N. Y. Supp. 682. Abb. N. C. 115.

⁵*Bank of United States v. Strong*, 9 Wend. 451.

⁶*Abbott v. Johnstown, G. & H. Horse R. Co.* 24 Hun, 135.

⁷Code Civ. Proc. § 3231; *Levin v.*

reach the same property, and both cases are tried together and he succeeds only as to a part of the property sought to be reached, he may be allowed costs in both actions.⁸

c. Severance after answer.—Where the plaintiff enters up judgment under the provisions of § 511 of the Code of Civil Procedure for the part admitted, and continues the action, he is not entitled to costs upon such entry of judgment. He is only entitled to costs in case he recovers enough on the balance to entitle him to costs.⁹ If he elects not to continue the action for the balance he is entitled to the same costs as upon the final judgment in any other case.

325. Costs upon granting an order of interpleader.—Costs upon granting an order of interpleader under § 820 of the Code of Civil Procedure are in the discretion of the court. The original defendant, if free from fault and making no claim upon the fund, is not usually compelled to pay costs,¹⁰ but is usually allowed motion costs and costs before notice of trial (\$20) out of the fund.¹¹ In an action of interpleader the unsuccessful claimant may be compelled to pay, not only the costs of the plaintiff, but also the costs of his codefendant.¹² By the order of interpleader and service of the supplemental complaint and answer, the action becomes an equitable action, although it was a legal action before, and costs are in the discretion of the court, as in most equitable actions.¹³ Section 820 of the Code of Civil

⁸*Clark v. MacDonald*, 62 Hun. 149, 41 N. Y. S. R. 753, 16 N. Y. Supp. 493.

⁹*Waite v. F. J. Kaldenberg Co.* 68 F.un, 528, 52 N. Y. S. R. 595, 22 N. Y. Supp. 1006.

¹⁰*Sney v. Equitable Life Assur. Soc.* 24 Jones & S. 274, 15 N. Y. Civ. Proc. Rep. 316, 18 N. Y. S. R. 834, 3 N. Y. Supp. 8.

¹¹*Broyer v. Ritter*, 34 N. Y. S. R. 688, 13 N. Y. Supp. 574; *Bowery Sav. Bank v. Mahler*, 13 Jones & S. 619, 1 Month. L. Bull. 30.

¹²*Miller v. De Pcyster*, 1 Abb. Pr. 234; *Richards v. Salter*, 6 Johns Ch. 448.

¹³*Windecker v. Mutual L. Ins. Co.* 12 App. Div. 73, 43 N. Y. Supp. 358; *Dinley v. McCullagh*, 92 Hun. 454, 72 N. Y. S. R. 416, 36 N. Y. Supp. 1007; *Cronin v. Cronin*, 3 How. Pr. N. S. 184, 9 N. Y. Civ. Proc. Rep. 137; *Bedell v. Hoffman*, 2 Paige, 199; *Clark v. Mosher*, 107 N. Y. 118, 1 Am. St. Rep. 798, 14 N. E. 96.

Procedure is substituted for the old action of interpleader and is governed by the same principles.¹⁴

326. Costs as affected by lack of jurisdiction.—The defendant is entitled to costs upon the dismissal of a complaint because the court has no jurisdiction, when the lack of jurisdiction is not apparent upon the face of the complaint,¹⁵ whether such lack is raised by the answer or appears upon the trial.¹⁶ The rule that costs cannot be allowed upon the dismissal of a complaint for want of jurisdiction only applies when the lack of jurisdiction appears upon the face of the summons and complaint.¹⁷

The plaintiff in bringing the action submits himself to the jurisdiction of the court, and the court has power to award costs against him, although it decides that it has not jurisdiction of the action.¹⁸

327. Costs as governed by stipulation.—The right that parties have or may have to the costs in an action may be waived by a stipulation between the parties. Where the parties stipulate that neither shall have costs of the action, none will be awarded.¹⁹ Where the parties upon an appeal stipulated that costs on appeal were to be allowed in the event of the court deciding a certain question, but the case was decided on another point, no costs were allowed to either party.²⁰ If a party to an action agrees to pay the costs and disbursements of another party to the action,

¹⁴*Windecker v. Mutual L. Ins. Co.* 12 App. Div. 73, 43 N. Y. Supp. 358; *Schell v. Louce*, 75 Hun. 43, 26 N. Y. Supp. 991; *Wenstrom Electric Co. v. Bloomer*, 85 Hun. 389, 32 N. Y. Supp. 903; *Pustet v. Flannelly*, 60 How. Pr. 67.

¹⁵*Cumberland Coal & I. Co. v. Hoffman Steam Coal Co.* 39 Barb. 16, 15 Abb. Pr. 78; *Hunt v. Genet*, 14 Daly, 225, 6 N. Y. S. R. 275; *King v. Poole*, 36 Barb. 242.

¹⁶*McMahon v. Mutual Ben. L. Ins. Co.* 3 Bosw. 644, 8 Abb. Pr. 297; *Harriott v. New Jersey R. & Transp. Co.* 1 Daly, 377.

¹⁷*Harriott v. New Jersey R. & Transp. Co.* 1 Daly, 377; *Malone v. Clark*, 2 Hill, 657; *Humiston v. Bal-lard*, 40 How. Pr. 40, 63 Barb. 9; *Gormly v. McIntosh*, 22 Barb. 271.

¹⁸*Day v. Sun Ins. Office*, 40 App. Div. 305, 57 N. Y. Supp. 1033; *Thiem v. Madden*, 27 Hun, 371; *Simmons v. Simmons*, 32 Hun, 551; *Donnelly v. Libby*, 1 Sweeny, 259.

¹⁹*Simon v. O'Brien*, 87 Hun, 160, 67 N. Y. S. R. 460, 33 N. Y. Supp. 815.

²⁰*Moses v. McDivitt*, 2 Abb. N. C.

as a consideration for the second party's doing or refraining from doing certain acts in that action, the court can enforce that stipulation by a motion in the action. The promisee will not be compelled to bring an action to enforce his rights under the stipulation.²¹ A party may bar himself of costs in the action, when, by his acquiescence, the record of the case is changed in open court, so that it appears that he is not entitled to costs.²² Where a judgment in an action at law is rendered for a party under a stipulation, which is silent on the question of costs, the prevailing party is entitled to enter up a judgment for the amount mentioned in the stipulation, together with costs, because costs follow as a matter of course, and if the defendant wished to protect himself from them, he should have inserted that provision in his stipulation.²³ The plaintiff is sometimes allowed costs and an additional allowance, where the judgment is entered by a stipulation which is ambiguous on that question.²⁴ A trustee will not be allowed to make an improvident stipulation as to costs and disbursements, and the court will relieve him from such a stipulation upon his motion for that relief, but will not grant him costs of the motion, although it is contested and he succeeds.²⁵ Parties will not be allowed to stipulate that the successful party should tax costs in excess of the rate allowed by law.²⁶

328. Commencement of an action without authority.—Where attorneys commence an action without authority, they will be compelled to pay the costs awarded against the plaintiff.²⁷ This relief will be obtained on a motion made in the action.²⁸

²¹*Kelsey v. Sargent*, 40 Hun. 150.
2 N. Y. S. R. 669.

²²*Topliff v. Freeman*, 25 N. Y. S. R. 102, 5 N. Y. Supp. 304.

²³*Wing v. New York & E. R. Co.* 1 Hilt. 235.

²⁴*Horgan v. Ricker*, 15 N. Y. S. R. 330.

²⁵*Coven v. King*, 54 App. Div. 331. 66 N. Y. Supp. 621.

²⁶*O'Keefe v. Shipherd*, 23 Hun. 171.

²⁷*Post v. Charlesworth*, 66 Hun. 256, 21 N. Y. Supp. 168.

²⁸*Post v. Charlesworth*, 66 Hun. 256, 21 N. Y. Supp. 168; *Vilas v. Plattsburgh & M. R. Co.* 123 N. Y. 450, *sub nom. Vilas v. Butler*, 9 L. R. A. 844, 20 Am. St. Rep. 771, 25 N. E. 941.

329. When the judge informs the jury of the effect of their verdict upon the question of costs.— It is not reversible error for the judge to inform a jury in actions where punitive damages are given, of the effect of their verdict upon the question of costs, since the measure of such damages is in the discretion of the jury, and costs are themselves punitive.²⁹ But in actions on contract it is reversible error to instruct the jury as to the right of the parties as to costs upon the amount of their verdict, because in these actions the recovery is to be determined on fixed principles.³⁰ But a mere reference to the effect of their verdict upon the question of costs in an action on contract, with a direction that they “must find a verdict upon the evidence, and that alone,” is not reversible error.³¹ Objection must be made to such instruction at the time it is given; if not then taken, it cannot be raised later.³² The judge is not bound to give these instructions in any case.³³ But where he attempts to inform the jury of the law on this point and misstates the law, this is such an error that a new trial will be granted.³⁴

330. Costs after entry of judgment.— All proceedings subsequent to the entry of a final judgment are motions, and only motion costs can be taxed for such proceedings.³⁵ The usual terms imposed upon the opening of a judgment are all the costs taxed in the judgment and the costs of opposing the motion to open the judgment.³⁶ Where a judgment was reversed upon an ap-

²⁹*Munson v. Curtis*, 15 N. Y. Civ. Dig. 290; *Kanna v. Kester*, 15 N. Y. Proc. Rep. 131, 17 N. Y. S. R. 349, Week. Dig. 119.

1 N. Y. Supp. 828; *Waffle v. Dillenback*, 38 N. Y. 53, 4 Abb. Pr. N. S. 457; *Nolton v. Moses*, 3 Barb. 31; *Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644. ³³*Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644; *Waffle v. Dillenback*, 38 N. Y. 53, 4 Abb. Pr. N. S. 457; *Rewey v. Riley*, 17 N. Y. Week. Dig. 573.

³⁰*Munson v. Curtis*, 15 N. Y. Civ. Proc. Rep. 131, 17 N. Y. S. R. 349, 1 N. Y. Supp. 828; *Lattimer v. Hill*, 8 Hun, 171. ³⁴*Smith v. Ferris*, 2 N. Y. Week. Dig. 163.

³¹*Tucker v. Ely*, 37 Hun, 565, 20 N. Y. Week. Dig. 380. ³⁵*Bishop v. Hendrick*, 82 Hun, 333, 64 N. Y. S. R. 100, 31 N. Y. Supp. 502, Affirmed on this opinion in 146 N. Y. 398, 42 N. E. 542.

³²*Andrews v. Miles*, 15 N. Y. Week. ³⁶*Born v. Schrenkeisen*, 20 Jones &

peal because the plaintiff was held bound by the recitals in another judgment between the same parties, he was allowed to amend the recitals in the judgment in the former action upon the payment of all the costs in the latter action, including the costs of the motion to make the amendment, and costs of the appeal from the order refusing him the right to make the amendment.³⁷ The special term has no power upon a motion to alter a judgment as to costs. Such a change can only be made after a rehearing before the trial judge, when the case has been sent back to him by a reversal of the judgment by the appellate court.³⁸ The special term has a right to set aside a judgment with the costs of motion, when, in its discretion, justice will be promoted thereby.³⁹

331. Costs upon an accounting.— Costs and allowances upon an accounting cannot be awarded till final judgment.⁴⁰ The plaintiff will not be charged with costs upon an accounting, because it appears that there is a small sum due to the defendant, where the action was necessary to close up a matter.⁴¹ For allowances in these actions, see § 307, *ante*.

332. When costs are made payable out of a fund.— Costs will not be awarded out of a fund to each claimant, as of course, but the allowance of costs rests in the discretion of the court. If the fund is not large enough to pay all claimants in full, each party will usually be compelled to pay his own costs, except the plaintiff who instituted the action and has had the burden of carrying it on. A mere custodian of a fund has no claim to costs unless he has done something to aid the court in the proper disposition of

S. 219, Affirmed in 110 N. Y. 55, 16 N. Y. S. R. 412, 17 N. E. 339.

³⁷*Jones v. Newton*, 47 N. Y. S. R. 217, 19 N. Y. Supp. 786.

³⁸*McLean v. Stewart*, 14 Hun, 472, Distinguishing *Rogers v. Ivers*, 23 Hun, 424; *Rockwell v. Carpenter*, 25 Hun, 529.

³⁹*Mutual L. Ins. Co. v. Kroehle*, 29 Misc. 481, 61 N. Y. Supp. 944.

⁴⁰*Rudd v. Robinson*, 54 Hun, 339, 27 N. Y. S. R. 98, 7 N. Y. Supp.

535. Reversed on other grounds in 126 N. Y. 113, 12 L. R. A. 473, 22 Am. St. Rep. 816, 36 N. Y. S. R. 500, 26 N. E. 1046.

⁴¹*Garvey v. Owens*, 35 N. Y. S. R. 133, 12 N. Y. Supp. 349.

the question.⁴² The depositary will not be charged with costs, where there has been no default or breach of contract on his part.⁴³ But where there is no other claimant, costs will be awarded against the depositary the same as in any other action.⁴⁴ The costs of the motion and the appeals therefrom can be ordered paid out of an attached fund upon the attorneys for the different claimants signing a stipulation to that effect.⁴⁵

333. *Costs payable to a guardian ad litem.* *a. Costs allowed a guardian ad litem.*—A guardian *ad litem*, in an action in equity or in a proceeding in surrogate's court can only be awarded taxable costs, including an extra allowance in a proper case, payable out of the fund. The court may award him a sum in excess thereof, but such sum must be payable out of the estate of the infant.⁴⁶ The court will refuse an allowance to a guardian *ad litem* when the fund from which it is to be paid is small and the action needless.⁴⁷ And it may order that the guardian be paid out of the fund a gross sum less than the taxable disbursements.⁴⁸ But where the plaintiff succeeds against the infant, and the fund is not large enough to pay the plaintiff's costs, he is not personally liable for the costs allowed to the guardian *ad litem*.⁴⁹ Where a defendant is appointed guardian *ad litem* for a codefendant, and his answer is practically the same in both capacities, he should be allowed, in case of his success, costs personally, and not as guardian.⁵⁰

⁴²*Collins v. Oceanic Steam Nav. Co.* *Doremus v. Crosby*, 66 Hun, 125, 20 1 N. Y. Week. Dig. 12; *Pierson v.* N. Y. Supp. 906. *Contra, Roberts v. New York Elev. R. Co.* 12 Misc. 345, 33 N. Y. Supp. 685; *New York Nat. Bank*, 74 N. Y. 290. *Life Ins. & T. Co. v. Sands*, 26 Misc. 252, 56 N. Y. Supp. 741.

⁴³*Bushnell v. Chautauqua County* 345, 33 N. Y. Supp. 685; *New York Nat. Bank*, 74 N. Y. 290. *Sands v. Sands*, 30 Misc. 338, 63 36 Hun, 303.

⁴⁴*Davenport v. Bank for Savings*, 252, 56 N. Y. Supp. 741. *Re Hulbert Bros. & Co.* 29 Misc. 481, 61 N. Y. Supp. 959.

⁴⁵*Re Robinson*, 40 App. Div. 30, 57 283, 61 N. Y. Supp. 790.

Union Ins. Co. v. Van Rensselaer, 4 Paige, 85; *Gott v. Cook*, 7 Paige, 521; *Downing v. Marshall*, 37 N. Y. 380; *Re Holden*, 126 N. Y. 589, 38 N. Y. S. R. 504; *Hill v. Lee*, 4 App. Div. 154, 74 N. Y. S. R. 506, 38 N. Y. Supp. 641. *Brown v. Murdock*, 12 Abb. N. C. 360.

b. Amount.—Where the general answer of an infant compels the plaintiff to prove his case, the guardian is entitled to costs after notice of trial, and trial fee.⁵¹

334. Costs allowed against a general guardian.—A guardian is properly chargeable with the costs of any proceedings brought to compel him to account for the property of his ward, or any proceedings caused by his failure to properly administer his ward's estate and properly account therefor.⁵²

335. Costs in various cases.—Where an action was brought to restrain a common council from entering into a contract contrary to law, the costs, upon the plaintiff's succeeding, should be allowed against those members of the common council whose conduct made the action necessary.⁵³

In an action against the mayor of a city to recover the award for property taken, allowed to unknown owners, the mayor can stop the running of interest by a payment of the amount to the city treasurer, but such payment does not relieve the mayor of costs, since the action must be tried to settle the issues.⁵⁴

Costs should be allowed against a Seneca Indian the same as against any other person, when he sues for a personal claim. General Laws, chap. 5, § 55, which provides that the costs awarded in an action against a Seneca Indian are to be paid by a warrant of the comptroller upon the state treasurer, applies only to actions in relation to the real property belonging to the tribe.⁵⁵

In an action for conversion or replevin, where the property is in the possession of a warehouseman, he is not a necessary or proper party defendant, unless he claims some right, title, or interest in the chattel other than a lawful lien for lawful charges growing out of the care and custody of such chattel. If

⁵¹*Roosevelt v. Schermerhorn*, 32 Misc. 287, 66 N. Y. Supp. 366.

⁵⁴*Bradhurst v. New York*, 20 Jones & S. 51.

⁵²*Spelman v. Terry*, 74 N. Y. 448;
Knothe v. Kaiser, 2 Hun, 515, 5
Thomp. & C. 4.

⁵⁵*Crouse v. New York, P. & O. R.*
Co. 49 Hun, 576, 18 N. Y. S. R. 711.
2 N. Y. Supp. 453.

⁵³*Boon v. Utica*, 5 Misc. 391, 26
N. Y. Supp. 932.

the legality or amount of such charges be disputed, the warehouseman may be made a party to the action for the purpose of determining that issue only, and shall recover costs if his claim be substantially sustained. Laws of 1892, chap. 608, § 2.

335a. Voluntary appearance.— The voluntary appearance of a defendant in an action is, for all the purposes of the action, the equivalent of personal service of the summons upon him, and entitles the plaintiff to the same costs, under Code Civ. Proc. § 3251, subd. 1, for each additional defendant served with the summons, as he would have been entitled to had the summons been personally served.⁵⁶

⁵⁶*Schwinger v. Hickox*, 46 How. Pr.
114.

CHAPTER XXVII.

LIABILITY OF SURETIES AND PERSONS BENEFICIALLY INTERESTED.

- 336. Liability of sureties upon an appeal to the appellate division of the supreme court.
- 337. — to the court of appeals.
- 338. — upon a bond given for the arrest of a party.
- 339. — upon an appeal in an ejectment action.
- 340. — in an attachment action.
- 341. — in a replevin action.
- 342. — upon the granting of an injunction.
- 343. Right of sureties to be reimbursed.
- 344. Right of municipalities to enforce liability of sureties.
- 345. Extent of liability of surety.
- 346. — upon an appeal from a justice's court to a county court.
- 347. — on undertakings given in a surrogate's court.
- 348. Statutory liability of persons beneficially interested.
- 349. How this liability is enforced.
- 350. Liability of absolute assignee of a cause of action.
- 351. — of person to whom a cause of action is assigned as collateral security.
- 352. — of attorney who is to receive a contingent fee.
- 353. — of assignor.
- 354. When a receiver in supplementary proceedings is liable for costs.
- 355. Liability of a general assignee for the benefit of creditors.
- 356. When a person is beneficially interested.
- 357. Liability for commencing an action in the name of a nonexistent plaintiff.
- 358. When a person is not beneficially interested.
- 359. Liability for defending an action in ejectment.
- 360. Liability outside of statute.

336. Liability of sureties upon an appeal to the appellate division of the supreme court.—An action cannot be maintained upon an undertaking given upon an appeal to the appellate division of the supreme court, until ten days have expired after the service upon the attorney for the appellant and upon the sureties upon such undertaking, of a written notice of entry of

a judgment or order affirming the judgment or order appealed from or dismissing the appeal.¹ This provision only applies to undertakings given in the cases enumerated. In other cases no notice of the entry of judgment is necessary, before bringing an action upon the undertaking.² After an appeal to the court of appeals has been perfected and security given thereupon to stay the execution of the judgment or order appealed from, an action cannot be maintained upon the undertaking given upon the preceding appeal until the final determination of the appeal to the court of appeals.³

A surety upon an appeal to the appellate division is not relieved from liability upon a reversal by that court, but he is liable if the court of appeals affirms the original judgment.⁴ Interest beyond the penalty is always recoverable.⁵

§37. — to the court of appeals.—The sureties upon an appeal to the court of appeals are primarily liable for all the costs of the action.⁶ The liability for costs in the court below rests primarily upon them, and their release by a judgment creditor releases the sureties upon the undertaking given below.⁷ Where an appeal is dismissed because the appellant did not give a new undertaking as required by the court of appeals, the sureties are liable only for the costs in the court of appeals.⁸ The sureties upon an appeal to the court of appeals from a judgment of the appellate division reversing a judgment of the trial court and directing a new trial are liable, upon the affirmance by the court of appeals of the judgment appealed from, only for costs in the

¹ Code Civ. Proc. § 1309.

²*Seaman v. McReynolds*, 50 How.

³*Galinger v. Engelhardt*, 26 Misc. Pr. 421; *Lyon v. Clark*, 8 N. Y. 148; 49, 55 N. Y. Supp. 334; *Barber v. Brainard v. Jones*, 18 N. Y. 35.

Rutherford, 12 Misc. 33, 66 N. Y. S. 690, 33 N. Y. Supp. 89; *Weil v. Culliford v. Walser*, 158 N. Y. 65, 70 Am. St. Rep. 437, 52 N. E. 648; *Kempf*, 12 N. Y. Civ. Proc. Rep. 379. *Chester v. Broderick*, 131 N. Y. 549, 30 N. E. 507.

⁵ Code Civ. Proc. § 1309.

⁶*Robinson v. Plimpton*, 25 N. Y. 484; *Traver v. Nichols*, 7 Wend. 434; *Ball v. Gardner*, 21 Wend. 270; *Smith v. Crouse*, 24 Barb. 433. ⁷*Hinckley v. Kreitz*, 58 N. Y. 583, *Rathbone v. Warren*, 10 Johns. 586. ⁸*Galinger v. Engelhardt*, 26 Misc. 49, 55 N. Y. Supp. 334.

court of appeals, because the undertaking is given merely to perfect an appeal to the court of appeals, and not to operate as a stay.⁹

A surety is liable for the costs of an action to enforce his liability, in addition to the amount of damages which the plaintiff may recover, and these costs may exceed the amount of the bond.¹⁰ The damages may be equal to the full amount of the penalty of the bond,¹¹ but the amount of costs awarded the plaintiff in a judgment against the principal alone cannot be included in the damages because the sureties could have been sued without bringing an action against the principal.¹² A surety cannot be made to pay the costs awarded in an action brought to set aside a settlement made by the assured with the principal.¹³ When a surety has the option of not paying a claim till the liability of the principal is determined by a suit, he cannot be made to pay the costs of the action which determined the liability, although the action was defended at his request.¹⁴ In an action against the sureties upon an undertaking upon an appeal to the court of appeals, a complaint which alleges that the court of appeals affirmed the order appealed from, with costs, and that a specific sum was duly awarded as costs and disbursements, is sufficient to allow proof of all the necessary facts to entitle the plaintiff to recover.¹⁵

338. — upon a bond given for the arrest of a party.— The undertaking given on an order of arrest under § 559 of the Code of Civil Procedure does not cover the general costs of the action,

⁹*Burdett v. Lowe*, 85 N. Y. 241; N. Y. 109, 63 N. E. 1073; *Douglass Post v. Doremus*, 60 N. Y. 371; *Bennett v. American Surety Co.* 73 App. Div. 468, 77 N. Y. Supp. 207.

¹²*Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435, 52 N. Y. S. R.

¹⁰*New York v. Ryan*, 9 Daly, 316.

138, 33 N. E. 1041.

¹¹*New York v. Sibberns*, 10 N. Y. Week. Dig. 294.

¹⁴*Fernald v. Providence Washington Ins. Co.* 27 App. Div. 137, 50 N.

¹²*Brooklyn ex rel. Stadlmair v.*

Y. Supp. 838.

Willard, 16 N. Y. Week. Dig. 315; *Thomson v. American Surety Co.* 170

¹⁵*Barter v. Lancaster*, 58 App. Div. 380, 68 N. Y. Supp. 1092.

but only such costs as are awarded as accruing directly from the arrest.¹⁶ Therefore, it is no answer to an action upon such an undertaking to allege that the costs in the action have been paid.¹⁷ Sureties upon an undertaking given on an order of arrest of the defendant, cannot be made, by proceeding under § 3247 of the Code of Civil Procedure, to pay the costs of an unsuccessful action, which they have carried on to protect themselves from liability. The defendant's remedy is by an action on the undertaking.¹⁸

339. — upon an appeal in an ejectment action.— Sureties on the bond of the defendant on appeal in an action in ejectment are not liable for the costs of the second trial, where the defendant paid the costs of the first trial, but they are liable for the use and occupation, according to their undertaking.¹⁹ In an action against an heir or devisee the defendant is liable only for his proportionate share of the debt, but he may be compelled to pay a full bill of costs in an action in which he is the sole defendant.²⁰

340. — in an attachment action.— Sureties on attachment are entitled to all payments made by their principal, and they are not liable for the costs of an appeal taken by their principal when the attachment was dissolved at special term.²¹ They are liable for the costs of the action where the attaching creditor suffers default.²² The surety upon an attachment is liable for an unsuccessful attempt to remove the attachment, and also for the

¹⁶*Sutorius v. North*, 20 N. Y. Civ. Proc. Rep. 162, 36 N. Y. S. R. 873, 13 N. Y. Supp. 557.

¹⁹*Clason v. Kehoe*, 87 Hun, 368, 68 N. Y. S. R. 336, 34 N. Y. Supp. 431.

¹⁷*Sperry v. Hellman*, 20 N. Y. Civ. Proc. Rep. 218, 37 N. Y. S. R. 258, 13 N. Y. Supp. 899; *Sutorius v. Dunstan*, 27 Jones & S. 166, 13 N. Y. Supp. 601.

²⁰Code Civ. Proc. § 1839; *Fink v. Berg*, 50 Hun, 211, 19 N. Y. S. R. 322, 2 N. Y. Supp. 851.

²¹*Bacoe v. Armstrong*, 26 Hun, 19, 62 How. Pr. 515.

²²*Metropolitan Concert Co. v. Currie v. Riley*, 14 N. Y. Week. Dig. *Sperry*, 58 Hun, 470, 35 N. Y. S. R. 407; *Edwards v. Bodine*, 11 Paige, 611, 12 N. Y. Supp. 494. Affirmed 223; *Aldrich v. Reynolds*, 1 Barb. without opinion in 125 N. Y. 759, 27 Ch. 613. N. E. 338.

costs of the action when the defendant wins.²³ Where the defendant makes reasonable efforts to vacate the attachment, he may recover of the sureties the costs of the trial, which was necessary to vacate the attachment.²⁴

341. — in a replevin action.—The undertaking given by the plaintiff in a replevin action covers the costs of the defendant,²⁵ and also the costs of an appeal from the judgment rendered in the action.²⁶ Likewise the undertaking given by the defendant in such an action, in order that he might retain the chattel, covers the costs of the plaintiff if he succeeds.²⁷

342. — upon the granting of an injunction.—The sureties upon a bond given upon the granting or continuing of an injunction are liable, in addition to the special damage provided for in the bond, for the costs and disbursements in procuring an order of reference to assess the damages caused by the injunction, and for the services of counsel upon such reference, together with the fees of the referee and stenographer upon such reference,²⁸ and for the counsel fees upon a successful motion to dissolve the injunction.²⁹ But they are not liable for counsel fees in opposing the motion for, or the continuance of, an injunction, because the surety agrees to respond for damages resulting to him because of the granting of the injunction.³⁰ Where on the service of the answer an injunction was dissolved and a reference was had to compute the amount of damages, it was held that the defendant was entitled to charge costs before

²³*Tyng v. American Surety Co.* 69 App. Div. 137, 74 N. Y. Supp. 502. 1123; *O'Connor v. New York & Y. Land Improv. Co.* 8 Misc. 243, 59 N. Y. S. R. 218, 28 N. Y. Supp. 544.

²⁴*Tyng v. American Surety Co.* 69 App. Div. 137, 74 N. Y. Supp. 502. ²⁵*Horey v. Rubber-Tip Pencil Co.* 3 Jones & S. 81, 12 Abb. Pr. N. S. 360, Affirmed in 50 N. Y. 335.

²⁶*Wisconsin M. & F. Ins. Co. Bank v. Hobbs*, 22 How. Pr. 494. ²⁷*Youngs v. McDonald*, 56 App. Div. 14, 8 N. Y. Anno. Cas. 461, 67 N. Y. Supp. 375; *Whiteside v. Noyac Cottage Asso.* 84 Hun. 555, 32 N. Y. Supp. 724; *Randall v. Carpenter*, 88 N. Y. 294.

²⁸*Tibbles v. O'Connor*, 28 Barb. 538. ²⁹*John Church Co. v. Dorsey*, 38 Misc. 542, 77 N. Y. Supp. 1065.

³⁰*Youngs v. McDonald*, 56 App. Div. 14, 8 N. Y. Anno. Cas. 461, 67 N. Y. Supp. 375, Affirmed without opinion in 166 N. Y. 639, 60 N. E.

notice of trial, costs of a motion to dissolve the injunction, and counsel fee for drawing up the answer and preparing to argue the motion for dissolution.³¹

The sureties are not liable for the costs of an unsuccessful motion to dissolve an injunction, which is denied upon the merits or for irregularity,³² nor for the costs of an unsuccessful appeal from the order denying the motion to dissolve the injunction. If the party had been successful the surety would have been liable.³³ But where such a motion is denied, not upon the merits nor for an irregularity, but in the discretion of the court, the successful defendant may recover the costs of such a motion against the sureties.³⁴ The sureties given upon an order to show cause why an injunction *pendente lite* should not issue, which order restrained the defendants until the further order of the court, are not liable for the counsel fee in opposing the motion to grant the injunction *pendente lite*, when the injunction is denied, and, as the temporary injunction would have expired upon the return day, counsel fees were not necessary to dissolve it.³⁵ They are not liable for counsel fees incurred by the defendant for the trial of the action. To render them liable it must appear that the defendant had made all reasonable and proper efforts to obtain a dissolution of the injunction, and had failed, so that the trial of the action was necessary to get rid of the preliminary injunction.³⁶ Where an additional allowance has been granted to cover the expenses of a motion to dissolve

³¹*Willett v. Scovil*, 4 Abb. Pr. 405.

³²*Allen v. Brown*, 5 Lans. 511. *Contra*, *Harrison v. Harrison*, 75 Hun, 191, 58 N. Y. S. R. 166, 26 N. Y. Supp. 965.

³³*Childs v. Lyons*, 3 Robt. 704.

³⁴*Andrews v. Glenville Woolen Co.* 50 N. Y. 287; *Disbrow v. Garcia*, 52 N. Y. 654; *Rose v. Post*, 56 N. Y. 603.

³⁵*Sweet v. Morry*, 71 Hun, 381, 25 N. Y. Supp. 32.

³⁶*Youngs v. McDonald*, 56 App. Div. 14, 8 N. Y. Anno. Cas. 461, 67 N. Y. Supp. 375, Affirmed without opinion in 166 N. Y. 639, 60 N. E. 1123; *Andrews v. Glenville Woolen Co.* 50 N. Y. 282; *Northrup v. Garrett*, 17 Hun, 497; *Whiteside v. Noyac Cottage Asso.* 84 Hun, 555, 32 N. Y. Supp. 724. See *Allen v. Brown*, 5 Lans. 511; *Newton v. Russell*, 87

the injunction and counsel fees upon the trial, the defendant should not be allowed those expenses upon a reference to ascertain the damages sustained by the injunction.³⁷

But a denial of an additional allowance is not a bar to recovery for such services upon the reference.³⁸ Where the trial is not principally in consequence of the injunction the expenses of the trial cannot be recovered of the sureties.³⁹ Nor are they liable for the counsel fees incurred upon the trial of the action, where the injunction was granted upon notice and the defendant did not oppose it, and no motion was made to vacate it.⁴⁰ A defendant will be denied costs upon the dissolution of an injunction where the action sought to be restrained is the use of a trademark which practises a deception upon the people. While the plaintiff might justly be required to pay costs the defendant ought not to receive them.⁴¹ A defendant cannot be allowed to prove, upon the motion to dissolve an injunction, facts which occurred after the commencement of the action, except upon terms which are usually all of the plaintiff's costs to date and the releasing of the plaintiff and his sureties from all liability upon the bonds given to procure the injunction.⁴²

343. Right of sureties to be reimbursed.— A surety is entitled to be reimbursed out of the security given to him by his principal for his costs, disbursements, and counsel fees in an action brought to hold him liable for the default of his principal, and which he successfully defends.⁴³ A surety or guarantor cannot recover of the principal debtor the amount of costs which he has been compelled to pay in an unsuccessful attempt to avoid paying the claim for which he became surety.⁴⁴ A grantee in a

³⁷*Disbrow v. Garcia*, 52 N. Y. 655.

³⁸*Smith v. Syracuse & G. R. Co.* 4

³⁹*Park v. Musgrave*, 6 Hun, 223. Month. L. Bull. 75.

⁴⁰*Newton v. Russell*, 87 N. Y. 531.

⁴¹*Albany v. Andrews*, 29 App. Div.

⁴²*Phoenix Bridge Co. v. Keystone* 20, 52 N. Y. Supp. 1129.

Bridge Co. 10 App. Div. 176, 41 N. Y. Supp. 891; *Hovey v. Rubber-Tip* 28 N. Y. S. R. 134; *Pencil Co.* 50 N. Y. 336. *Sturdevant v. Riley*, 28 N. Y. S. R. 896, 8 N. Y. Supp. 281.

⁴⁴*Fetridge v. Wells*, 4 Abb. Pr. 144, 13 How. Pr. 385.

deed may recover of the grantor the taxable costs, disbursements, and his own counsel fee, incurred in an action brought to enforce a restriction in the grantor's deed, of which the grantee was ignorant.⁴⁵ Sureties on an undertaking have no right to compel the creditor to sell a pledge of the principal debtor in his hands because they have unconditionally promised to pay the debt.⁴⁶

And upon a mortgage foreclosure they are not entitled to have the costs of the action first paid out of the proceeds of the sale, even if the judgment provides that the costs shall be so paid.⁴⁷

344. Right of municipalities to enforce liability of sureties.— Where the costs awarded in an action or special proceeding, to public officers become, by force of a statute, the property of a municipality, the municipality may maintain an action in its own name against the sureties given to its officers in such action or special proceeding, and the officers are not necessary parties to an action against the sureties upon their undertaking.⁴⁸

345. Extent of liability of surety.— Where a surety has given a bond to save another harmless from certain demands, and the assured has been sued thereon, the surety is liable only for the costs incurred up to the time papers were served on the assured, unless he at once informs the surety of that fact and requests the surety to take care of the action. The costs accruing after the service of the summons are unnecessary.⁴⁹

346. — upon an appeal from a justice's court to a county court.— An undertaking given upon an appeal from a judgment of a justice's court to a county court covers the costs of a demurrer which the plaintiff interposes to an answer that the defendant is allowed to interpose in the county court. The fact that an appeal has been taken from the order overruling the de-

⁴⁵*Charman v. Hibbler*, 31 App. Div. 191, 58 N. Y. Supp. 1031; *Sutherland v. Carr*, 85 N. Y. 105; *Auburn Bd. of Edu. v. Quick*, 99 N. Y. 138, 1 N. E. 533.

⁴⁶*Sterne v. Talbott*, 89 Hun, 368, 35 N. Y. Supp. 412.

⁴⁷*Leopold v. Epstein*, 54 App. Div. 133, 66 N. Y. Supp. 414.

⁴⁸*New York v. Bannan*, 42 App.

⁴⁹*Steinhart v. Doellner*, 2 Jones & S. 218.

murrer is no answer to an action on the undertaking, until a stay is obtained.⁵⁰

347. — on undertakings given in a surrogate's court.—The surety on the bond of an administrator is not liable for the costs which the surrogate, upon an accounting, makes payable directly to the attorneys, because the surrogate has no power to make such an allowance. The allowances should have been made to the client.⁵¹ The sureties are as much liable for the costs awarded upon the removal of a guardian as for the amount of the infant's money in the hands of the removed guardian.⁵² If an allowance is made upon an accounting which is computed upon a wrong basis or any other excess of jurisdiction the sureties can raise the question in an action against them to recover such allowance.⁵³ An attorney for an assignee for the benefit of creditors cannot maintain an action against the assignee's sureties, when the assignee fails to pay him the amount directed by the court to be paid to the attorney, unless the surety was a party to the proceedings and is bound thereby, or there is an adjudication that the attorney has a claim against the assigned estate.⁵⁴

348. Statutory liability of persons beneficially interested.—The liability of third persons for costs is now regulated by § 3247 of the Code of Civil Procedure, which is a re-enactment of the corresponding provision in the Revised Statutes.⁵⁵ Under § 321 of the Code of Procedure, with a different wording it was held that a person defending in the name of another could be

⁵⁰*Crandell v. Bicker*, 32 Misc. 258, Div. 128, 41 N. Y. Supp. 1020; *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. 66 N. Y. Supp. 352; *Rice v. Whitlock*, 16 Abb. Pr. 225; *Channing v. Moore*, 11 N. Y. S. R. 670; *Heebner v. Townsend*, 8 Abb. Pr. 234.

⁵¹*Browning v. Vanderhoven*, 55 How. Pr. 97.

⁵²*McMahon v. Smith*, 20 Misc. 305, 45 N. Y. Supp. 665; *Wilcox v. Smith*, 26 Barb. 316; *Devin v. Patchin*, 26 N. Y. 441-449.

⁵³*Van Slyck v. Bush*, 24 Jones & S. 478, 4 N. Y. Supp. 710; *Marsh v. Avery*, 81 N. Y. 29.

⁵⁵2 Rev. Stat. 619, § 44, 2 Ed-

⁵⁴*Phillips v. Liebmann*, 10 App. monds' Stat. 515, § 41.

charged with costs.⁵⁶ The Code of Civil Procedure has taken the phraseology of the Revised Statute instead of the Code of Procedure. Under the Revised Statutes it was held that the provisions applied to one prosecuting an action, not one defending,⁵⁷ and the same construction has been placed on the present statute.⁵⁸

Where the statute provides that the grantee may maintain an action in ejectment in the name of his grantor, because the conveyance under which he claims is void on the ground that the property was held adversely to his grantor, the defendant, in the event of his success, cannot tax costs against the nominal plaintiff, but may be allowed to tax costs against the grantee.⁵⁹

349. How this liability is enforced.—The liability of a third person is enforced by an order of the court, under § 3247 of the Code of Civil Procedure.⁶⁰ Where the court decided that a third party should pay costs of an action, his liability was, under the old Code, enforced by attachment.⁶¹ Where it has been adjudged that a third party is liable for costs of an action, as being the party beneficially interested, and certified copies of the orders are served upon him and a demand made for the payment of the costs, application may be made and an order thereon granted to punish him for contempt for failing to pay costs as directed, and fining him the amount of the costs, and no further proof is necessary to show that his refusal to pay costs did defeat, impair, impede, or prejudice the rights of the opposite party. The fact that the order directs payment of the costs to the defendant's attorney is immaterial.⁶²

⁵⁶*Wolcott v. Holcomb*, 31 N. Y. 126. R. 598. 17 N. Y. Supp. 237; *Bourdon*

⁵⁷*Miller v. Adsit*, 18 Wend. 672; *v. Martin*, 74 Hun, 246, 56 N. Y. S. R. 314, 26 N. Y. Supp. 378; *Wolcott v. Holcomb*, 31 N. Y. 125.

⁵⁸*Peetsch v. Quinn*, 12 Misc. 61, 1 N. Y. Anno. Cas. 282, 24 N. Y. Civ. Proc. Rep. 394, 66 N. Y. S. R. 689, 33 N. Y. Supp. 87.

⁵⁹Code Civ. Proc. § 1501.

⁶⁰*Henricus v. Englert*, 43 N. Y. S.

⁶¹*Marvin v. Marvin*, 78 N. Y. 541; *Morrison v. Lester*, 11 Hun, 618, 15 Hun, 538. *Contra*, *Remington Paper Co. v. O'Dougherty*, 6 N. Y. Civ. Proc. Rep. 70.

⁶²*Tucker v. Gilman*, 20 N. Y. Civ.

It is within the discretion of the court to deny a motion to compel a person to pay the costs of an action in which he was beneficially interested, as having been prematurely made, if an appeal is pending undetermined, although the appellant has not given an undertaking on the appeal, and no stay of proceedings has been granted.⁶³ The notice of motion must be served on the party sought to be charged. It is not enough to serve it upon the attorney who has appeared for the plaintiff in the action, as his authority ceased with the entry of the judgment, and the very question in issue is whether the attorney for the plaintiff is the attorney for the third party.⁶⁴

350. Liability of absolute assignee of a cause of action.—Where a party takes an absolute assignment of a pending action, he becomes liable for the whole costs the same as if he were originally a party.⁶⁵ The same liability also attaches where a judgment is assigned, which is reversed on appeal.⁶⁶

351. — of person to whom a cause of action is assigned as collateral security.—If he takes an assignment of a cause of action as collateral security, he is not liable for the costs of the action.⁶⁷ But where an assignee prosecutes the action himself he is liable for costs.⁶⁸

Proc. Rep. 397, 37 N. Y. S. R. 958, 14 N. Y. Supp. 392.

⁶³*Slauson v. Watkins*, 14 Jones & S. 172.

⁶⁴*Henry v. Derby*, 21 Jones & S. 125, 11 N. Y. Civ. Proc. Rep. 106.

⁶⁵*Genet v. Davenport*, 58 N. Y. 607; *Columbia Ins. Co. v. Stevens*, 37 N. Y. 536; *Jordan v. Sherwood*, 10 Wend. 622; *Miller v. Adsit*, 18 Wend. 672; *Creighton v. Ingersoll*, 20 Barb. 541; *Carnahan v. Pond*, 15 Abb. Pr. 194; *Tucker v. Gilman*, 58 Hun, 167, 33 N. Y. S. R. 962, 11 N. Y. Supp. 555, Affirmed in 125 N. Y. 714, 26 N. E. 756; *Olmstead v. Keyes*, 2 How. Pr. N. S. 1; *Wolcott v. Holcomb*, 31 N. Y. 125; *Merceron*

v. Fowler, 14 Jones & S. 351; *Re Tynq*, 17 N. Y. Week. Dig. 234.

⁶⁶*Tucker v. Gilman*, 58 Hun, 167, 33 N. Y. S. R. 962, 11 N. Y. Supp. 555. Affirmed in 125 N. Y. 714, 26 N. E. 756.

⁶⁷*Peck v. Yorks*, 75 N. Y. 421; *Miller v. Franklin*, 20 Wend. 630; *Wolcott v. Holcomb*, 31 N. Y. 124; *Dowling v. Bucking*, 52 N. Y. 658, 15 Abb. Pr. N. S. 190; *Thorn v. Beard*, 139 N. Y. 482, 54 N. Y. S. R. 807, 34 N. E. 1100.

⁶⁸*Whitney v. Cooper*, 1 Hill, 629; *Schoolcraft v. Lathrop*, 5 Cow. 17; *Murray v. Hendrickson*, 6 Abb. Pr. 96, 1 Bosw. 35; *People ex rel. Bailey v. Albany Mayor's Court Judges*, 9

Where the cause of action is not transferable and the judgment is afterwards vacated or reversed the assignee is not liable for costs.⁶⁹ The assignment of a claim pending the action will not prejudice the defendant in offsetting against any recovery the costs that may be awarded him in the action.

352. — of attorney who is to receive a contingent fee.— An attorney is not liable for the costs as an assignee, where he has an agreement to receive a certain per cent of the recovery for his services in the action.⁷⁰ Where an attorney moved to dismiss the complaint on the ground that the parties had collusively settled the case to deprive him of his costs, and after the motion had been denied he made a motion for leave to renew it, he is properly charged with the costs of the last motion, upon its refusal.⁷¹

353. — of assignor.— A person cannot escape liability for the costs of an action when the assignment is merely colorable, although such assignment was made before the action was commenced.⁷² The decision of the trial court directing a verdict for the defendant on the ground that the plaintiff is not the real party in interest establishes the fact of the beneficial interest of the pretended assignor for the purpose of charging him with the costs of the action.⁷³ A person who assigns a cause of action for the purpose of avoiding giving security for costs may be compelled to pay the costs of an unsuccessful action brought by his assignee.⁷⁴ A party who assigns his cause of action pending the action is still liable for the costs of the action.⁷⁵

Wend. 486; *Carnahan v. Pond*, 15 Abb. Pr. 194.

⁶⁹*Tucker v. Gilman*, 58 Hun. 167, 33 N. Y. S. R. 962, 11 N. Y. Supp. 555. Affirmed in 125 N. Y. 714, 26 N. E. 756.

⁷⁰*Green v. Lee*, 8 N. Y. Week. Dig. 131; *Banta v. Naughton*, 7 N. Y. S. R. 384; Code Civ. Proc. § 3247.

⁷¹*Eisner v. Hamel*, 6 Hun. 234, Affirmed in 66 N. Y. 646.

⁷²*Winants v. Blanchard*, 12 N. Y. S. R. 384.

⁷³*Re Tyng*, 17 N. Y. Week. Dig. 234.

⁷⁴*Pendleton v. Johnson*, 21 N. Y. Civ. Proc. Rep. 272, 18 N. Y. Supp. 211.

⁷⁵*Grosfent v. Tallman*, 2 How. Pr. 147.

354. When a receiver in supplementary proceedings is liable for costs.—A judgment creditor will not be liable for costs awarded against a receiver in supplementary proceedings,⁷⁶ unless the action was brought at the sole suggestion and urgency of such party and was virtually conducted by him, especially where it was not brought by the direction or leave of the court.⁷⁷ This is so, even as to costs awarded against him as a defendant.⁷⁸ A receiver in supplementary proceedings must either file the written request of the creditor to bring an action which makes the judgment creditor liable personally or a bond.⁷⁹ Motion costs awarded against a receiver may be ordered paid by the judgment creditors when the receiver acts at the instigation of the creditors and for their benefit.⁸⁰

355. Liability of a general assignee for the benefit of creditors.—Where a general assignee refuses to continue the defense in a replevin action brought against his assignor, but the plaintiff obtains an order bringing him in unless he make an offer of judgment with costs to date, and the defendant makes such an offer, the plaintiff cannot recover his costs out of the fund, because the assignee has not intermeddled in the action nor claimed the goods.⁸¹

⁷⁶*Cutter v. Reilly*, 5 Robt. 637, 31 How. Pr. 472; *Whitney v. Cooper*, 1 Hill, 632; *Colvard v. Oliver*, 7 Wend. 497; *Miller v. Franklin*, 20 Wend. 630; *Bliss v. Otis*, 1 Denio, 656; 5 Month. L. Bull. 19; *Wheeler v. Giles v. Halbert*, 12 N. Y. 32; *McHarg v. Donnelly*, 27 Barb. 100; *Gal-*

lation v. Smith, 48 How. Pr. 477. ⁷⁹Rule 79; *M'Hench v. M'Hench*, 7 Hill, 204; *Thompson v. McCloskey*, 5 Month. L. Bull. 19; *Wheeler v. Wright*, 23 How. Pr. 228, 14 Abb. Pr. 353.

⁸⁰*Interior Conduit & Insulation Co. v. Alexander*, 27 Misc. 598, 59 N. Y. Supp. 126; *Ward v. Roy*, 69 N. Y. 96; *Bourdon v. Martin*, 84 Hun, 179, 32 N. Y. Supp. 441. ⁸¹*McCarthy v. Wright*, 56 Hun, 387, 31 N. Y. S. R. 371, 10 N. Y. Supp. 824; *Taylor v. Bolmer*, 2 Denio, 193; *Miller v. Franklin*, 20 Wend. 630; *Heather v. Neil*, 14 N. Y. Week. Dig. 46.

⁷⁸*Bourdon v. Martin*, 84 Hun. 179, 65 N. Y. S. R. 716, 32 N. Y. Supp.

356. When a person is beneficially interested.—A party who agrees to carry on a suit for another and to have a share of the proceeds is beneficially interested and is liable for the costs recovered against the nominal plaintiff.⁸² But where he has transferred his interest, and takes no part in the action, he is not liable.⁸³ An assignor of a cause of action, who is to receive a portion of the expected recovery, is beneficially interested and is liable for the costs of the action, although he did not employ the attorney nor furnish funds to carry on the action.⁸⁴ A party is liable for costs where he brings an action in the name of another, without authority. This applies to a case where the action is brought in the name of the people or of an officer, where the party has not complied with the statutory requirements.⁸⁵

357. Liability for commencing an action in the name of a non-existent plaintiff.—A party is liable for the costs of an action which he has instituted in the name of a nonexistent plaintiff,⁸⁶ or by persons claiming to be trustees of a corporation, and it is adjudged that they are not trustees and have no authority to bring the action.⁸⁷

358. When a person is not beneficially interested.—It is not enough that, had the action succeeded, the recovery would have been for the exclusive benefit of a third person. He must be chargeable with having brought the action.⁸⁸ Where a third

⁸²*Giles v. Halbert*, 12 N. Y. 32.

⁸³*Bradley v. Van Buren*, 22 N. Y. Week. Dig. 568.

⁸⁴*Merceron v. Fowler*, 14 Jones & S. 351; *Wheeler v. Wright*, 14 Abb. Pr. 353, 23 How. Pr. 228; *Voorkces v. McCartney*, 51 N. Y. 387; *Bliss v. Otis*, 1 Denio, 656; *Giles v. Halbert*, 12 N. Y. 32; *Whitney v. Cooper*, 1 Hill, 629.

⁸⁵*Jobbitt v. Giles*, 10 N. Y. Week. Dig. 523.

⁸⁶*Metropolitan Addressing & Mailing Co. v. Goodenough*, 21 N. Y. Civ. Proc. Rep. 268, 18 N. Y. Supp. 212;

Perrigo v. Dowdall, 25 Hun, 234; *Slauson v. Watkins*, 95 N. Y. 369; *Winants v. Blanchard*, 12 N. Y. S. R. 384; *Waring v. Barret*, 2 Cow. 460; *Pendleton v. Johnston*, 21 N. Y. Civ. Proc. Rep. 272, 18 N. Y. Supp. 211.

⁸⁷*Baptist Soc. v. Loomis*, 49 Hun, 414, 22 N. Y. S. R. 485, 3 N. Y. Supp. 572.

⁸⁸*Greenwood v. Marvin*, 11 N. Y. S. R. 235; *Whitney v. Cooper*, 1 Hill, 629; *McHarg v. Donnelly*, 27 Barb. 100; *Hone v. De Peyster*, 106 N. Y. 645, 13 N. E. 778; *Elliot v. Lewicky*, 19 Jones & S. 51, 7 N. Y. Civ. Proc.

party advises a plaintiff that he has a good cause of action, and furnishes him money to prosecute the action, because he thinks that the plaintiff has a righteous cause, he is not beneficially interested so as to be liable for costs in case the plaintiff fails.⁸⁹

359. Liability for defending an action in ejectment.—A landlord who defends an action in ejectment brought against his tenant,⁹⁰ or a grantor who defends such an action against his grantee,⁹¹ or a mortgagee who defends such an action against his mortgagor, may be compelled to pay costs.⁹²

360. Liability outside of statute.—A party who has fraudulently procured the execution of a will is a proper party in an action to set aside such will that he may be charged with costs.⁹³ It is proper to make a person a party defendant in an equity action, although he only signed the agreement upon which the action was based, as agent, where he defied the orders of the court in relation to the agreement. In such a case costs may be properly imposed upon him.⁹⁴ Where parties are brought in on their own application in a proceeding to punish a receiver for contempt, and fail in their contention, they are properly chargeable with the costs of the proceeding.⁹⁵

Rep. 82; *Slauson v. Watkins*, 95 N. Y. Civ. Proc. Rep. 405, 52 N. Y. 369.

⁸⁹*Re Harwood*, 50 N. Y. S. R. 114, 21 N. Y. Supp. 572.

⁹⁰*Perrigo v. Dowdall*, 25 Hun. 234.

⁹¹*Farmers' Loan & T. Co. v. Kursch*, 5 N. Y. 558.

⁹²*Sand v. Church*, 32 App. Div. 139,

⁹³*Brady v. McCosker*, 1 N. Y. 214.

⁹⁴*Cooper v. Townsend*, 37 N. Y. S.

R. 122, 13 N. Y. Supp. 760.

⁹⁵*Pierce v. Lees*, 17 App. Div. 346,

45 N. Y. Supp. 294.

CHAPTER XXVIII

STAY FOR NONPAYMENT OF COSTS.

- 361. In general.
- 362. Procedure to obtain stay.
- 363. When the actions are brought in different courts.
- 364. Stay when the cause of action is assigned.
- 365. Party seeking stay must be interested in collecting the unpaid costs.
- 366. Different actions arising from the same cause.
- 367. Party suing *in forma pauperis*.
- 368. When an infant will be stayed.
- 369. When a party is entitled to a stay.
- 370. When the stay becomes operative.
- 371. What proceedings are stayed.
- 372. How the stay may be waived.
- 373. How the stay is terminated.

361. In general.—The court has an inherent power to stay the vexatious and annoying proceedings of a party, until he pays the costs of a former proceeding,¹ which power it will exercise upon application to it. The Code of Civil Procedure also provides for a stay of proceedings for the nonpayment of motion costs. No application is necessary to invoke this statutory stay, except the service upon the adverse party of the order requiring the payment of the costs. Upon the expiration of ten days after such service the stay is in operation.²

362. Procedure to obtain stay.—The motion for a stay should be made in the action sought to be stayed,³ and should be based on affidavits showing all the facts upon which a stay is asked.⁴ Such a motion may be made at any time before the trial of the

¹*Foley v. Rathborne*, 12 Hun, 589. ³*Dederick v. Hopsrutt*, 4 How. Pr. Meyer v. Briel, 2 Month. L. Bull. 72. 350, 3 N. Y. Code Rep. 86.

²Code Civ. Proc. § 779; *Thaule v. Hilderbrand v. Ogden*, 1 Month. Frost, 1 Abb. N. C. 298; *Lyons v. L. Bull.* 74.

Murat, 54 How. Pr. 23, 4 Abb. N. C.

13; *Hazard v. Wilson*, 3 Abb. N. C.

50. See how waived, § 372, *infra*.

second action,⁵ or even during the litigation of that action.⁶ But such a motion cannot be made after judgment is perfected in the second action.⁷ In the district courts of New York the application should be made before the joinder of issue.⁸ To entitle the defendant to such an order he must show a good defense, either by an answer served or by an affidavit of merits.⁹ Upon a motion for a stay the court may compel the plaintiff to pay not only the costs in the first action, but also the costs of the motion for a stay, before he is allowed to proceed.¹⁰ The granting of the stay is not an absolute right, but depends upon the discretion of the court.¹¹ The failure to pay costs of a former action is a mere irregularity, and does not deprive the court of jurisdiction of a second action for the same cause, unless such adjudication was upon the merits.¹² The defendant is not bound to issue an execution to collect costs, nor can he be defeated, upon his application for a stay, on the ground of laches.¹³

363. When the actions are brought in different courts.—It makes no difference that the second action is brought in a different court,¹⁴ although the former action was brought in a Fed-

⁵*Cuyler v. Vanderwerk*, 1 Johns. 380; *Barton v. Speis*, 73 N. Y. 133; Cas. 247.

⁶*Jackson ex dem. Williamson v. Miller*, 3 Cow. 57.

⁷*Fifield v. Brown*, 2 Cow. 503; *Salters v. Ralph*, 15 Abb. Pr. 273.

⁸*Voullaire v. Wise*, 19 Misc. 659, 44 N. Y. Supp. 510; *Noe v. Gregory*, 8 N. Y. Week. Dig. 21.

⁹*Faulkner v. Cody*, 28 Misc. 66, 59 N. Y. Supp. 807.

¹⁰*Edwards v. Ninth Ave. R. Co.* 22 How. Pr. 444.

¹¹*Dare v. Murphy*, 18 Abb. N. C. 466, 12 N. Y. Civ. Proc. Rep. 388; *McMahon v. Mutual Ben. L. Ins. Co.* 12 Abb. Pr. 28; *Drake v. New York Iron Mine*, 71 Hun. 211, 54 N. Y. S. R. 211, 24 N. Y. Supp. 518; *Griffin v. Round Lake Camp Meeting Asso.* 26 Hun. 314; *Ex parte Stone*, 3 Cow.

380; *Barton v. Speis*, 73 N. Y. 133; *Morgenstern v. Zink*, 6 Misc. 418, 27 N. Y. Supp. 299.

¹²*Patchen v. Delaware & H. Canal Co.* 62 App. Div. 543, 71 N. Y. Supp. 122; *Wessels v. Boettcher*, 142 N. Y. 212, 36 N. E. 883; *Foster v. Bowen*, 1 Code Rep. N. S. 236; *Barton v. Speis*, 73 N. Y. 133.

¹³*Doyle v. Recorder Printing Co.* 30 Hun. 645.

¹⁴*Farrell v. New York Juvenile Asylum*, 2 App. Div. 496, 3 N. Y. Anno. Cas. 13, 74 N. Y. S. R. 414, 37 N. Y. Supp. 1118; *Sprague v. Bartholdi Hotel Co.* 68 Hun. 555, 52 N. Y. S. R. 663, 22 N. Y. Supp. 1090; *Morgenstern v. Zink*, 6 Misc. 418, 27 N. Y. Supp. 299; *Edwards v. Ninth Ave. R. Co.* 22 How. Pr. 444; *Thompson v. Burchell*, 16 Jones & S. 537;

eral court.¹⁵ But this rule does not apply if the former action was brought in the courts of another state.¹⁶ It makes no difference that the action is one for divorce, separation, or annulment of a marriage, nor that it is brought by the husband or by the wife.¹⁷ A receiver will be stayed in an action for the same cause, until the costs of the former action are paid, when the first action was dismissed because of the irregularity of his appointment.¹⁸ The district courts of New York have the same power as the supreme court to grant a stay in the second action till the costs in the former are paid.¹⁹ A justice of the peace has not that power.²⁰ The payment of the costs of the former action is a sufficient answer to the defendant's motion for a stay.²¹

364. Stay when the cause of action is assigned.—An unsuccessful plaintiff cannot, by assigning his cause of action confer upon his assignee any other or different rights than he himself had, and the assignee will be stayed in the second action till the costs of the former action are paid.²² A plaintiff who has become such by substitution cannot appeal from a judgment against his predecessor dismissing the complaint, until the costs of a motion by the former plaintiff to set aside the judgment are paid.²³

365. Party seeking stay must be interested in collecting the un-

Perkins v. Hinman, 19 Johns. 237; *Co. S N. Y. Week. Dig.* 272; *Gardenier v. Oswego Mut. Sav. & Aid Asso.* 26 Hun. 314; *Bush v. Lathrop*, 41 N. Y. S. R. 30, 17 N. Y. Supp. 22 N. Y. 535; *Young v. Guy*, 12 Hun. 325; *Richardson v. White*, 27 How. Pr. 155; *Spaulding v. American Wood Board Co.* 58 App. Div. 314, 68 N. Y. Supp. 945; *Murray v. Cameron*, 38 N. Y. S. R. 793, 15 N. Y. Supp. 13; *Hill v. Grant*, 2 Thomp. & C. 467; *Barton v. Speis*, 73 N. Y. 133; *MacWhinnie v. Cameron*, 57 Hun. 463, 19 N. Y. Civ. Proc. Rep. 168, 32 N. Y. S. R. 985, 11 N. Y. Supp. 20.

¹⁵*Jackson ex dem. Allen v. Carpenter*, 3 Cow. 22.

¹⁶*Julio v. Ingalls*, 15 Abb. Pr. 429.

¹⁷*Hepburn v. Hepburn*, 54 How. Pr. 466, 2 Month. L. Bull. 90; *Nichols v. Nichols*, 18 Jones & S. 251.

¹⁸*Bates v. Dickerson*, 35 N. Y. S. R. 928, 12 N. Y. Supp. 773.

¹⁹*Lewis v. Davis*, 8 Daly, 185.

²⁰*Youle v. Brotherton*, 10 Johns. 363.

²¹*Lewis v. Davis*, 8 Daly, 185.

²²*Hebbard v. United States L. Ins.*

²³*Gardenier v. Eldred*, 21 N. Y. Civ. Proc. Rep. 221, 40 N. Y. S. R. 225, 15 N. Y. Supp. 819.

paid costs.—A second action for the same cause will not be stayed where the defendant in the second action has not, at the time the application for a stay is made, an interest in the collection of the costs of the first action. A second action will not be stayed until the costs in the first action are paid, where it is brought against the same defendant, but the first action was against the defendant personally and the second against him in a representative capacity.²⁴

Where, after the first action, the defendant has transferred his interest in the disputed property to another, the second action against the assignee will not be stayed until the costs of the former action are paid, because the defendant in the second action has no interest in enforcing the payment of the costs in the first action.²⁵ But where the second action is brought against the defendant in the first action and his assignee, the plaintiff will be stayed in the second action as to both defendants.²⁶ So, a second action will not be stayed against the defendant in the first action where he has assigned the costs in that action and has no interest in the application.²⁷

A stay will not be granted in an action where the parties seeking the stay were not parties to the former action.²⁸ Nor will an action be stayed for the nonpayment of costs, where the plaintiff in the second action claims under the same title as the plaintiff in the former action, but was not a party to that action.²⁹ The court can grant a stay in the second action, although new defendants have been included in that action.³⁰

366. Different actions arising from the same cause.—Where

²⁴*Vetterlein v. Barnes*, 43 Hun. 437; *Beemer v. McCoy*, 2 City Ct. Rep. 296; *Jackson ex dem. Livingston v. Edwards*, 1 Cow. 138; *Richardson v. White*, 27 How. Pr. 155.

²⁵*Bolton v. Corse*, 15 Jones & S. 493; *Jackson ex dem. Clark v. Clark*, 1 Cow. 140.

²⁶*Ten Broeck v. Reynolds*, 13 How. Pr. 462.

²⁷*Kentish v. Tatham*, 6 Hill, 372; *Hill v. Grant*, 2 Thomp. & C. 467.

²⁸*Simpson v. Brewster*, 3 Paige, 245.

²⁹*Kentish v. Tatham*, 6 Hill, 372; *Picison v. Lydecker*, 1 Law. Rec. 177.

the second action involves the same title, but relates to different land, the action will not be stayed.³¹ Where the plaintiff has a cause of action in tort, and one *ex contractu* arising from the same cause, the causes of action are distinct, and where he has been defeated in one he will not be stayed in the second till the costs of the first are paid.³² Where the plaintiff in the first action claimed to be a factor, and sought to foreclose his lien, and the court held that he was the owner, taking under a warranty, the defendant will be stayed in an action upon the warranty until the costs of the first action are paid. Both actions are brought upon the same contract and relate to the same subject-matter.³³

367. Party suing in forma pauperis.—A plaintiff suing *in forma pauperis* will not be stayed till the costs in a former action for the same cause are paid.³⁴ But motion costs incurred in the same action, before the plaintiff had obtained leave to sue as a poor person, will act as a stay.³⁵

368. When an infant will be stayed.—An appeal by an infant by a guardian *ad litem* who has become insolvent will not be stayed until the costs of the trial are paid.³⁶

369. When a party is entitled to a stay.—Where an equity action is dismissed without prejudice to an action at law upon the same contract, which was sought to be reformed in the former action, the action at law will not be stayed because of the nonpayment of costs of the equity action. The words "without prejudice" mean that the plaintiff is at liberty to prosecute an action at law the same as if no previous action had been brought

³¹*Stewart v. Hilton*, 27 Misc. 239, 58 N. Y. Supp. 415.

³²*Arnold v. Clark*, 9 Daly, 259.

³³*Spaulding v. American Wood Board Co.* 58 App. Div. 314, 68 N. Y. Supp. 945; *Sprague v. Bartholdi Hotel Co.* 68 Hun, 555, 22 N. Y. Supp. 1090; *Thompson v. Burchell*, 16 Jones & S. 537.

³⁴Code Civ. Proc. § 461; *Herbert v. Drake*, 2 N. Y. City Ct. Rep. 175; *Harris v. Mutual L. Ins. Co.* 18 N. Y. Civ. Proc. Rep. 195, 10 N. Y. Supp. 473.

³⁵*Lyons v. Murat*, 4 Abb. N. C. 13.

³⁶*Wice v. Commercial Ins. Co.* 7 Daly, 253, 2 Abb. N. C. 325.

thereon.³⁷ There is no presumption that costs are paid, and when the defendant moves for a stay the burden is on the plaintiff to prove that they have been paid.³⁸ It must appear from the record that the actions are identical, and that the relief sought in each is similar.³⁹

A stay will not be granted until the first action is ended, because until that time the defendant is not entitled to costs. An action is not ended till an order of discontinuance is entered. It cannot be discontinued on mere notice.⁴⁰ Where a motion for a stay is denied on the ground that the former action is not ended the defendant may make another motion without obtaining leave of the court, after the final judgment has been entered in the former action.⁴¹ The imprisonment of the judgment debtor is a satisfaction of the judgment as long as it continues. Therefore, a new action for the same cause will not be stayed while the plaintiff is imprisoned under a body execution issued in the former action.⁴²

370. When the stay becomes operative.—The stay for nonpayment of the costs required to be paid by an order mentioned in § 779 of the Code of Civil Procedure does not commence until the expiration of ten days after the personal service of a copy of the order, or twenty days, if the service is by mail.⁴³ Costs imposed as a condition of the discontinuance of an action must be taxed by the defendant before the nonpayment thereof will oper-

³⁷*Skeels v. Bodine*, 68 App. Div. 217, 73 N. Y. Supp. 1093; *Davis v. Duffie*, 3 Abb. Pr. 363, 5 Duer. 688. *Recder v. Lockwood*, 30 Misc. 531, 62 N. Y. Supp. 713; *Pettibone v. Drakeford*, 1 How. Pr. N. S. 141; *Canavello v. Michael & Co.* 31 Misc. 170, 63 N. Y. Supp. 967; *Verplank v. Kendall*, 15 Jones & S. 513; *Margulies v. Damrosch*, 23 Misc. 77, 51 N. Y. Supp. 833; *Robinson v. Klein*, 31 Abb. N. C. 481, 62 N. Y. S. R. 73, 30 N. Y. Supp. 262. *Contra, Hazard v. Wilson*, 3 Abb. N. C. 50.

³⁸*Arnold v. Clark*, 9 Daly. 259.

³⁹*Bishop v. Bishop*, 7 Robt. 194.

⁴⁰*Noonan v. New York, L. E. & W. R. Co.* 68 Hum. 387, 52 N. Y. S. R. 203, 22 N. Y. Supp. 860.

⁴¹*Eaton v. Wyckoff*, 4 Wend. 203.

⁴²*Marks v. King*, 66 How. Pr. 453, 13 Abb. N. C. 374; *Austin v. Wit-*

ate as a stay to the commencement of a second action for the same cause.⁴⁴ Where by stipulation of the parties a new order is substituted in place of a former order, there must be a service of a copy of the second order to entitle the party to a stay.⁴⁵

371. What proceedings are stayed.—A stay for nonpayment of motion costs is regulated by the Code of Civil Procedure and the court has no power to grant a stay more extensive than that provided by law.⁴⁶ A party under a stay which has not been waived cannot move the case, when it is reached on the call of the calendar. If he does move the case, any judgment obtained by him will be set aside.⁴⁷ Nor can he make a motion in the case.⁴⁸ Nor enter up judgment because the answer is not properly verified.⁴⁹ The nonpayment of motion costs will not stay any proceedings necessary to enable the party in default to review the order by motion⁵⁰ or by an appeal;⁵¹ nor a motion for retaxing the costs of such an appeal;⁵² nor to set aside a body execution issued to collect the judgment entered;⁵³ nor a motion by an administrator to be substituted as a party in the place of the deceased, whose proceedings were stayed, because only a party can be stayed, and the administrator will not be a party till the motion is granted.⁵⁴ A third party will not be restrained till the costs of a party to the action are paid;⁵⁵ nor will a party be stayed from making a motion to compel the opposite party to enter the judgment in the action.⁵⁶ A failure to pay costs in a

⁴⁴*People v. Tweed*, 5 Hun, 382. *Locker Coal Co.*, 25 Misc. 309, 54 N. Y. Supp. 566.

⁴⁵*Thalcemer v. Hays*, 6 N. Y. S. R. 125, 26 N. Y. Week. Dig. 209. ⁵²*Thalcemer v. Hays*, 6 N. Y. S. R. 125, 26 N. Y. Week. Dig. 209.

⁴⁶*Feist v. New York*, 15 App. Div. 495, 44 N. Y. Supp. 497. ⁵³*Knoff v. Ellsworth*, 8 N. Y. S. R. 568; *National Bank v. Hansee*, 15 Abb. N. C. 488, 2 How. Pr. N. S. 200, 7 N. Y. Civ. Proc. Rep. 350.

⁴⁷*Brown v. Griswold*, 23 Hun, 618. ⁵⁴*Clute v. Emerich*, 16 N. Y. Civ. Proc. Rep. 123, 19 N. Y. S. R. 710, 2 N. Y. Supp. 874.

⁴⁸*Mooney v. Ryerson*, 8 N. Y. Civ. Proc. Rep. 435. ⁵⁵*Foley v. Rathbone*, 4 N. Y. Week. Dig. 55.

⁴⁹*Marsh v. Woolsey*, 14 Hun, 1. ⁵⁶*Ten Eyck v. Warwick*, 24 N. Y. Week. Dig. 55.

⁵¹*Anonymous*, 4 Abb. N. C. 11; *Weehawken Wharf Co. v. Knicker-*

supplementary proceeding stays only the supplementary proceedings, and not the proceedings in the action.⁵⁷ A motion for the same relief as the motion in which the unpaid costs were incurred will be stayed till the costs of the former motion are paid.⁵⁸ A party under a stay cannot place the cause on the short cause calendar,⁵⁹ but placing it on that calendar before the costs are paid is not a contempt of court.⁶⁰ Where a party under a stay is ready to proceed with the trial whenever it is moved by the opposite party, the latter cannot take a default or an inquest. His only right is to insist upon his stay, and demand that the opposite party shall not move the case. If he moves the case the party under a stay can assert all his rights as though he had not been under a stay. The moving of the cause for trial is a waiver of the stay.⁶¹

A party under a stay cannot take an onward movement in the action. He cannot serve a reply to a counterclaim set up in the answer, but he has the right to serve a defensive pleading. He may serve an answer although he has not paid motion costs. He is not the aggressor in the action.⁶² A party to whom motion costs are ordered paid may serve an answer setting up a counterclaim, before the stay becomes effective, and such service is not a waiver of the stay. The defendant may insist upon his stay when the plaintiff serves his reply to the counterclaim.⁶³

Costs awarded upon an appeal to the appellate division of the

Civ. Proc. Rep. 6, 63 N. Y. S. R. 165,
30 N. Y. Supp. 859.

⁵⁷*Godfrey v. Pell*, 5 Month. L. Bull.
69.

⁵⁸*Thaule v. Frost*, 1 Abb. N. C. 298.

⁵⁹*McHugh v. Astrophe*, 2 Misc. 478,
51 N. Y. S. R. 142, 22 N. Y. Supp.
79.

⁶⁰*Powell v. Schenck*, 6 App. Div.
130, 39 N. Y. Supp. 877.

⁶¹*Eisenlord v. Clum*, 52 Hun, 461,
17 N. Y. Civ. Proc. Rep. 147, 24 N.
Y. S. R. 102, 5 N. Y. Supp. 512.

⁶²*Randell v. Abrisqueta*, 20 Abb. N.
C. 292, 2 N. Y. City Ct. Rep. 303.

⁶³*Robinson v. Klein*, 31 Abb. N. C.
481, 62 N. Y. S. R. 73, 30 N. Y. Supp.
262; *Lyons v. Murat*, 4 Abb. N. C.
13, 54 How. Pr. 23; *Thaule v. Frost*,
1 Abb. N. C. 298.

supreme court on an appeal from an order act as a stay under § 779 of the Code of Civil Procedure. The amendment to this section by chap. 181 of the Laws of 1884 settled the conflict of authority upon this point.⁶⁴

372. How the stay may be waived.—The party who is entitled to the stay may waive the same by taking an onward movement in the case,—as, by serving a notice of trial,⁶⁵ or by not insisting upon it when the opposite party makes a movement in the action,—as, by accepting the notice of trial from the party in default,⁶⁶ or arguing a motion on its merits and taking an appeal therefrom;⁶⁷ or by proceeding with the case without further objection, after the court has held that the stay can be determined by payment of the costs at that time;⁶⁸ or by arguing a motion upon its merits without claiming a stay.⁶⁹ A party does not waive the stay by serving a pleading.⁷⁰

373. How the stay is terminated.—As soon as the costs are paid, either to the attorney of the opposite party,⁷¹ or to the sheriff upon an execution, the stay is terminated.⁷² It has been

⁶⁴*Cohen v. Krulewitch*, 81 App. Div. 531, 62 N. Y. Supp. 713; *Verplanck* Div. 147, 80 N. Y. Supp. 689; *Hunt v. Kendall*, 15 Jones & S. 513.

Sullivan, 79 App. Div. 119, 79 N. Y. Supp. 708; *McIntyre v. German Sav. Bank*, 59 Hun, 536, 13 N. Y. S. 513.

⁶⁵*Verplanck v. Kendall*, 15 Jones & S. 513.

⁶⁶*Atty. Gen. v. Continental L. Ins. Co.* 38 Hun, 521.

⁶⁷*Moore v. Moore*, 44 App. Div. 253, 60 N. Y. Supp. 653.

⁶⁸*Kiefer v. Grand Trunk R. Co.* 37 N. Y. S. R. 306, 13 N. Y. Supp. 860; *Re Loftus*, 41 N. Y. S. R. 357, 16 N. Y. Supp. 327.

⁶⁹*Robinson v. Klein*, 31 Abb. N. C. 481, 62 N. Y. S. R. 73, 30 N. Y. Supp. 262; *Lyons v. Murat*, 4 Abb. N. C. 13, 54 How. Pr. 23; *Marks v. King*, 13 Abb. N. C. 374, 66 How. Pr. 453.

⁷⁰*Moore v. Moore*, 44 App. Div. 253, 60 N. Y. Supp. 653.

⁷¹*Brown v. Kahn*, 17 Hun, 599.

⁷²*Reeder v. Lockwood*, 30 Misc.

held at special term that a party who has not paid motion costs may make a motion in the action, and if the opposite party upon the argument objects to the hearing of the motion on the ground that the former costs are not paid, the moving party may obviate that objection by then paying the costs of the former motion.⁷³

⁷³*Moore v. Moore*, 44 App. Div. 253,
60 N. Y. Supp. 653.

CHAPTER XXIX.

TAXATION OF COSTS.

- 374. In general.
- 375. Notice of taxation.
- 376. Retaxation.
- 377. Power of the clerk upon the taxation of costs.
- 378. Duty of the clerk upon the taxation of costs.
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 - b. Entering judgment upon a remittitur.
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- 379. Procedure upon a review of taxation of costs.
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 - b. Papers used upon appeal from the taxation of the clerk.
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 - d. Right to review the taxation of costs lost by laches.
 - e. Right to review the taxation of costs waived by appeal.
 - f. Procedure upon appeal from the order of the special term.
 - g. Appeal lies to what courts.
- 380. How costs are taxed upon the decision of an appeal.

374. In general.— The statute governing the taxation of costs is found in §§ 3262–3267 of the Code of Civil Procedure.

Costs may be taxed upon notice, as required in § 3263 of the Code of Civil Procedure; or, where it is important that the judgment be entered at once, the costs may be taxed *ex parte* and notice of retaxation given as provided by § 3264 of the Code of Civil Procedure. All the parties interested in the question of costs may stipulate that the costs be taxed at a certain sum. Then no notice of taxation or retaxation is necessary. Where both parties are entitled to costs, or one party is entitled to the recovery and the other to the costs, only one judgment should be entered. If the plaintiff does not enter judgment, the defend-

ant can obtain leave from the court to do it.¹ If one of several defendants has not paid interlocutory costs awarded against him, but not against the other defendants, only one judgment can be entered, but different sums may be taxed against the different parties, and the interlocutory costs may be taxed against the proper party.²

There is no authority for severing an action after judgment for the purpose of taxing such costs.³ The clerk should tax the costs, where a case is put over the term and the parties cannot agree upon the amount of costs.⁴

375. Notice of taxation.— It is no objection to a notice of adjustment of costs that it was given before the right to recover costs was established, provided that the right to such costs as were taxed, existed at the date for which the notice was given.⁵ A letter proposing to tax a bill of costs at a certain time is not a notice of taxation, and a taxation of costs on such notice is irregular.⁶ A party who does not appear before the taxing officer waives his right to object to the amount.⁷ Where it is sworn positively that no notice of adjustment of costs has been received, the opposite party must show the time and manner of serving such notice.⁸ If the notice is not served the required time before the taxation, such taxation is irregular.⁹ If the opposite party does not appear on the day for which the taxation was noticed the costs may be taxed on a subsequent day without any further notice.¹⁰ An assignee for creditors should give notice of taxation of his costs and expenses to all the parties who

¹*Johnson v. Farrell*, 10 Abb. Pr. 384; *Reilly v. Lee*, 85 Hun, 315, 66 N. Y. S. R. 460, 32 N. Y. Supp. 976; ⁶*Brown v. Ferguson*, 2 How. Pr. 128.

Runnell v. Griffin, 8 Abb. Pr. 39. ⁷*Hinckley v. Boardman*, 3 Cai. 134. ⁸*Van Wyck v. Reid*, 10 How. Pr. 366.

²Code Civ. Proc. §§ 779, 1246. ⁹*Bissell v. Dayton*, 2 How. Pr. 80. ¹⁰*Cooper v. Astor*, 1 Johns. Cas. 32.

³*Fox v. Muller*, 31 Misc. 470, 64 N. Y. Supp. 388. *O'Loughlin v. Hammond*, 12 N. Y. Civ. Proc. Rep. 171. *Contra, Bissell v. Dayton*, 2 How. Pr. 80.

⁴*Anonymous*, 4 Sandf. 693.

have appeared.¹¹ A defendant who appears is entitled to notice of adjustment of costs, although he omits to answer, and the judgment without notice to him is irregular.¹² A person who will eventually be compelled to pay the costs of an action may, by motion, have the costs therein taxed at the proper amount, although he is not a party to that action.¹³

376. Retaxation.— Where costs are taxed without notice, the amount, as adjusted at that time, is final. If, upon retaxation, the amount of costs is reduced, the judgment is not changed, but the amount of the reduction is credited upon the execution.¹⁴ Where costs are inserted in a judgment without taxation, this is a mere irregularity which should be cured by a motion. The objection cannot be taken upon appeal from the final judgment.¹⁵ Where costs have been taxed without notice the remedy is by motion, as provided in § 3264 of the Code of Civil Procedure, and not by an appeal from the judgment.¹⁶ Upon such a motion the affidavit of the moving party should show to what items objection is made.¹⁷ Where one of two defendants enters up a judgment with costs, a codefendant who objects to the taxation of costs should move to have the judgment opened and corrected, and then tax his costs and enter the proper judgment.¹⁸ The court will not order a retaxation of costs, where the judgment debtor has paid the costs previous to the motion.¹⁹

377. Power of the clerk upon the taxation of costs.— The clerk

¹¹*Re Bowlby*, 34 Misc. 311, 69 N. Y. Supp. 783.

¹²*Elson v. New York Equitable Ins. Co.* 2 Sandf. 654, 2 N. Y. Code Rep. 30; *Gilmartin v. Smith*, 4 Sandf. 684.

¹³*Keeler v. Keeler*, 102 N. Y. 30, 1 N. Y. S. R. 673, 6 N. E. 678.

¹⁴*Hewitt v. City Mills*, 136 N. Y. 211, 49 N. Y. S. R. 335, 32 N. E. 768; *Baker v. Coddington*, 3 Misc. 512, 52 N. Y. S. R. 416, 23 N. Y. Supp. 5; *Dix v. Palmer*, 5 How. Pr. 233.

¹⁵*Hecla Consol. Gold Min. Co. v. O'Neill*, 23 N. Y. Civ. Proc. Rep. 143, 51 N. Y. S. R. 436, 22 N. Y. Supp. 130.

¹⁶*Re Plattsburgh*, 27 App. Div. 353, 50 N. Y. Supp. 356.

¹⁷*Jermain v. Lake Shore & M. S. R. Co.* 5 Month. L. Bull. 58.

¹⁸*Hauselt v. Bonner*, 17 N. Y. Civ. Proc. Rep. 320, 25 N. Y. S. R. 36, 6 N. Y. Supp. 473, Affirmed in 117 N. Y. 634, 22 N. E. 1129.

¹⁹*Day v. Beach*, 1 How. Pr. 236.

can tax costs only as allowed by the Code of Civil Procedure.²⁰ The costs and disbursements which may be taxed are confined to business done in court in the progress of a cause.²¹

The certificate of the trial judge as to any fact is conclusive upon the clerk, and he cannot disregard it.²² If the certificate is incorrect it should be corrected on motion, not by retaxation of costs.²³ The clerk has no power to refuse to tax separate bills of costs, proposed by defendants who answered separately, on the ground that such separation was unnecessary and collusive. The remedy of the plaintiff is by a motion in court for the relief to which he deems himself entitled.²⁴ The clerk must follow the order or judgment, and if that is not right the remedy is to appeal therefrom, or by an application to the court for that relief, not to move for a retaxation of costs.²⁵ Where there is no verdict, report of a referee, or order of the court awarding costs the clerk should refuse to tax costs. If the party thinks that he is entitled to costs he should apply to the court for an order requiring the clerk to tax his costs.²⁶

The clerk should decide questions of fact raised by conflicting affidavits. The special term should pass on questions of law.²⁷ The only way of presenting legal evidence before the clerk is by affidavits.²⁸ The clerk exhausts his powers on one hearing before him.²⁹ After the clerk has once taxed costs, he cannot, in the absence of both parties, again retax costs.³⁰

²⁰*Newman v. Greiff*, 3 N. Y. Civ. N. Y. Supp. 566; *Schum v. Rochester*, 16 N. Y. Civ. Proc. Rep. 218, 20 Proc. Rep. 362.

²¹*Lynch v. Meyers*, 3 Daly. 256. N. Y. S. R. 547, 3 N. Y. Supp. 512;

²²*Cooley v. Cummings*, 24 Jones & *Hearn v. Sullivan*, 13 Abb. N. C. 371; S. 521, 17 N. Y. Civ. Proc. Rep. 145. *Oleott v. MacLean*, 11 Hun, 394.

²³*Bailey v. Stone*, 41 How. Pr. 346.

²⁴*Crosley v. Cobb*, 37 Hun, 271, 9

²⁵*Van Gelder v. Hallenbeck*, 15 N. N. Y. Civ. Proc. Rep. 322.

²⁶*Lyman v. Young Men's Cosmo-*

²⁷*Williams v. Cassidy*, 22 Hun, N. Y. Supp. 712.

²⁸*Larkin v. Steele*, 25 Hun, 254.

²⁹*Murdoch v. Adams*, 10 Hun, 566.

³⁰*Mankattan R. Co. v. Youmans*, 81 Hun, 82, 62 N. Y. S. R. 562, 30

378. Duty of the clerk upon the taxation of costs. *a. In general.*—The duty of the clerk upon the taxation of costs is defined by § 3266 of the Code of Civil Procedure. He should examine the charges,³¹ and should correct all errors.³² If the affidavit of a disbursement shows that the item is not properly taxable, he should disallow it, although there is no opposing affidavit.³³ In taxing the referee's fees, he should be satisfied that the number of days for which a charge is sought to be taxed was necessarily spent on the reference.³⁴

b. Entering judgment upon a remittitur.—Generally, where a judgment is affirmed with costs, the clerk has power to tax the costs upon entering judgment upon the remittitur.³⁵ If the clerk has not the power to adjust the costs the court has power to so adjust them.³⁶

c. Upon special proceedings.—The clerk may tax costs on a mandamus,³⁷ but not in special proceedings,—as, in street opening cases.³⁸

379. Procedure upon a review of taxation of costs. *a. In general.*—Where the costs are improperly taxed the remedy is not by an appeal from the judgment, but by a motion to readjust costs, and the deduction, if any, should be taken from the judgment.³⁹ An action in equity will not lie to correct the error.⁴⁰

b. Papers used upon appeal from the taxation of the clerk.—Upon an appeal from the taxation by the clerk, only those papers can be used which were used before the clerk, as this is in the nature of an appeal from the clerk's rulings.⁴¹ Where oral ob-

³¹*Belding v. Conklin*, 4 How. Pr. 196, 2 N. Y. Code Rep. 112; *Stimson v. Huggins*, 16 Barb. 658, 9 How. Pr. 86.

³²*Rogers v. Rogers*, 2 Paige, 458.

³³*Bick v. Reese*, 52 Hun. 125, 17 N. Y. Civ. Proc. Rep. 110, 23 N. Y. S. R. 404, 5 N. Y. Supp. 121; *Delecomyn v. Chamberlain*, 48 How. Pr. 409.

³⁴*Brown v. Windmuller*, 4 Jones & S. 75, 14 Abb. Pr. N. S. 359.

³⁵*Kelly v. Plum*, 50 How. Pr. 236.

³⁶*Cochran v. Ingersoll*, 11 Hun. 342.

³⁷*People ex rel. Sanders v. Colborne*, 20 How. Pr. 378.

³⁸*Re Fourth Ave.* 11 Abb. Pr. 189.

³⁹*Watson v. Gardiner*, 50 N. Y. 671; *Beattie v. Qua*, 15 Barb. 132; *Andrews v. Cross*, 17 Abb. N. C. 92.

⁴⁰*New York v. Cornell*, 9 Hun. 215.

⁴¹*Remington Paper Co. v. O'Brien*, 18 N. Y. Week. Dig. 209; *Evans v.*

jections are made and sustained, the opposite party can present affidavits showing what took place before the clerk, and this does not allow the opposite party to submit an affidavit on the merits.⁴² An affidavit of what took place before the clerk is not necessary when the clerk gives his reasons for his decision.⁴³ The papers thus used need not be filed if they are presented to the clerk and he is apprised of their contents.⁴⁴ Where costs have been taxed by default, which is properly excused, the court may send the matter back to the clerk to act on *de novo*.⁴⁵

The appellant should show by affidavit that the taxation was opposed, and that the items objected to were taxed by the taxing officer over his objection.⁴⁶ The special term has a right to review the question of costs before the entry of judgment.⁴⁷ The appellate division of the supreme court may make an original order of retaxation when the matter is brought before it, although it usually refrains from so doing until the matter has been passed on by the special term.⁴⁸ It may do this although no appeal has been taken from the taxation of the clerk.⁴⁹

c. How the discretion of the court or referee in awarding costs is reviewed.—In equity actions where the discretion as to costs has been exercised by the court or referee, such discretion cannot be reviewed at special term, but only by an appeal from

Silbermann, 7 App. Div. 139, 40 N. Y. Supp. 298; *Lyon ex dem. Eden v. Wilkes*, 1 Cow. 591; *Smith v. Kerr*, 15 N. Y. Civ. Proc. Rep. 126; *Webb v. Crosby*, 11 Paige, 193; *Shultz v. Whitney*, 9 Abb. Pr. 71, 17 How. Pr. 471; *Varnum v. Wheeler*, 9 N. Y. Civ. Proc. Rep. 421; *Comly v. New York*, 1 N. Y. Civ. Proc. Rep. (McCarty) 306.

⁴²*Mattheys v. Matson*, 3 N. Y. Civ. Proc. Rep. 157.
⁴³*Constantine v. Van Winkle*, 2 How. Pr. 273; *Cuyler v. Coats*, 10 How. Pr. 141; *Lotti v. Krakauer*, 1 N. Y. City Ct. Rep. 60, 1 N. Y. Civ. Proc. Rep. 312, note; *People v. Oakes*, 1 How. Pr. 195; *Wilder v. Wheeler*, 1 How. Pr. 136; *Cutter v. Morris*, 41 Hun. 575, 7 N. Y. S. R. 426, 26 N. Y. Week. Dig. 254.

⁴⁴*Lyman v. Young Men's Cosmopolitan Club*, 38 App. Div. 220, 56 N. Y. Supp. 712; *Webb v. Crosby*, 11 Paige, 193.
⁴⁵*Meosbrugger v. Kaufman*, 7 App. Div. 380, 40 N. Y. Supp. 213.
⁴⁶*Anonymous v. Anonymous*, 10 How. Pr. 353.

⁴⁷*New York v. Best*, 19 App. Div. 68, 45 N. Y. Supp. 970.
⁴⁸*Cohu v. Husson*, 13 Daly, 334;

⁴⁹*Erans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298. *Whipple v. Williams*, 4 How. Pr. 28.

the judgment upon proper exceptions.⁵⁰ Where one of the parties enters a judgment for costs not warranted by the decision, the opposite party should move to correct the judgment in that respect at special term,⁵¹ or call the attention of the appellate court to that fact upon an appeal from the judgment.⁵²

d. Right to review the taxation of costs lost by laches.—The motion to review the taxation of costs should be made promptly and before the costs are paid,⁵³ as the right may be lost by laches.⁵⁴

e. Right to review the taxation of costs waived by appeal.—A party who appeals from a judgment waives his objection to its regularity.⁵⁵ But where a party appeals from a judgment before he learns that the clerk has decided who was entitled to costs, he is not estopped from reviewing the clerk's taxation of costs.⁵⁶ Nor does a party, by appealing from a judgment entered upon the report of a referee, which gave costs to neither party, waive his right to move for a correction of the judgment.⁵⁷ But a party waives his right to review the allowance of costs when he enters the judgment himself.⁵⁸

⁵⁰*Kiernan v. Agricultural Ins. Co.* *Dresser v. Wickes*, 2 Abb. Pr. 460; 3 App. Div. 26, 74 N. Y. S. R. 417, *Guckenhimer v. Angevine*, 16 Hun, 37 N. Y. Supp. 1070; *Marshall v.* 453; *Mooers v. Saunders*, 6 Ch. Sent. *Boyer*, 52 Hun, 181, 23 N. Y. S. R. 75; *Morris v. Mullett*, 1 Johns. Ch. 302, 5 N. Y. Supp. 150; *Rosa v. Jenkins*, 31 Hun, 384.

⁵¹*Marshall v. Boyer*, 52 Hun, 181, R. 749, 18 N. Y. Supp. 533; *Pfaudler Barm Extracting Bunting Apparatus Co. v. Sargent*, 43 Hun, 154, 25 N. Y. Week. Dig. 483, 5 N. Y. S. R. 413; 103; *Briggs v. Hilton*, 99 N. Y. 517, *Stevens v. New York Elev. R. Co.* 26 52 Am. Rep. 63, 3 N. E. 51; *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958.

⁵²*Marshall v. Boyer*, 52 Hun, 181, 23 N. Y. S. R. 302, 5 N. Y. Supp. 150.

⁵³*Collomb v. Caldwell*, 5 How. Pr. 336, N. Y. Code Rep. N. S. 41; *Schermerhorn v. Van Voast*, 5 How. Pr. 458; *Dun v. Brach*, 1 How. Pr. 236.

⁵⁴*Penfield v. James*, 4 Hun, 69;

⁵⁵*Sleeman v. Hotchkiss*, 45 N. Y. S. R. 749, 18 N. Y. Supp. 533; *Pfaudler Barm Extracting Bunting Apparatus Co. v. Sargent*, 43 Hun, 154, 25 N. Y. Week. Dig. 483, 5 N. Y. S. R. 413; 103; *Briggs v. Hilton*, 99 N. Y. 517, *Stevens v. New York Elev. R. Co.* 26 52 Am. Rep. 63, 3 N. E. 51; *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958.

⁵⁶*Le Roy v. Browne*, 54 Hun, 534, 18 N. Y. Civ. Proc. Rep. 125, 23 N. Y. S. R. 210, 8 N. Y. Supp. 82.

⁵⁷*Marshall v. Boyer*, 52 Hun, 181, 23 N. Y. S. R. 303, 5 N. Y. Supp. 150.

⁵⁸*Burrows v. Butler*, 38 Hun, 121.

f. Procedure upon appeal from the order of the special term.

—Upon an appeal from an order resettling costs the recitals in the order will be conclusive, where none of the papers are before the appellate court.⁵⁹ Where it does not appear just what items were allowed and what objections were made by the appellant, the court will not examine the matter, but will affirm the order.⁶⁰ A party cannot raise the point that the affidavits before the clerk were insufficient, when he did not object to the affidavits at the special term. If he had objected at special term the judge could have sent the matter back to the clerk with instructions to tax the costs upon the filing of proper affidavits.⁶¹ Where an order has been made in the allowance of costs, the party feeling aggrieved exhausts his remedies upon appealing from that order, and that question is never, after the decision upon appeal, an open one.⁶² Oral statements made on the appeal, and which were not before the clerk upon the taxation, cannot control the decision of the court.⁶³

g. Appeal lies to what courts.—An appeal does not lie to the court of appeals from an order of the appellate division of the supreme court, readjusting the costs in an action.⁶⁴ But upon an appeal from the judgment in the action, the question as to which party is entitled to costs is a matter of strict legal right, and may be reviewed by that court.⁶⁵ Where the question is, which party is entitled to costs, the court of appeals will review that question upon appeal from an order.⁶⁶

⁵⁹*Atkinson v. Truesdell*, 28 N. Y. 41 N. Y. 362; *Hoe v. Sanborn*, 36 N. S. R. 585, 7 N. Y. Supp. 801. Y. 93, 3 Abb. Pr. N. S. 189, 35 How.

⁶⁰*Matthews v. Matthews*, 14 N. Y. Pr. 197; *Clarke v. Rochester*, 34 N. Civ. Proc. Rep. 399, 17 N. Y. S. R. Y. 355; *McGregor v. McGregor*, 32 994, 1 N. Y. Supp. 222. N. Y. 479.

⁶¹*Rieger v. Swan*, 2 Misc. 467, 51 ⁶⁵*Hoe v. Sanborn*, 36 N. Y. 93, 3 N. Y. S. R. 140, 21 N. Y. Supp. 1037. Abb. Pr. N. S. 189, 35 How. Pr. 197;

⁶²*Brotherson v. Consaulus*, 5 N. Y. St. John v. West, 4 How. Pr. 329, 3 S. R. 105. N. Y. Code Rep. 85; *Tallman v. Hin-*

⁶³*Wolff v. Horn*, 9 Misc. 100, 29 N. *man*, 10 How. Pr. 89.
Y. Supp. 75. ⁶⁶*Sturgis v. Spofford*, 58 N. Y. 103.

⁶⁴*People ex rel. Clute v. Boardman*,

380. How costs are taxed upon the decision of an appeal.—Where a respondent charges too much costs upon the dismissal of an appeal, the appellant's remedy is by a motion in the court below.⁶⁷ A judgment of affirmance should not contain costs included in a previous judgment, but should contain only the costs of that appeal. Where previous costs are included in a judgment of affirmance, the error should be corrected on motion in the court below.⁶⁸ Where the judgment below differs from the remittitur in respect to costs, the remedy is by a motion in the court below to correct the judgment.⁶⁹ The appellant is bound by the judgment entered upon the remittitur, if he does not seek to have it corrected.⁷⁰ Where an order is reversed a judgment cannot be entered upon the remittitur, as the costs are interlocutory and do not authorize the entry of a judgment. If such a judgment is entered, the proper practice is to move in the court below to set it aside.⁷¹ Where the appellate division grants special motion costs, no taxation is necessary. The order is sufficient in itself. Where disbursements, to be taxed by the clerk, are also granted, this is authority to the clerk to tax the disbursements. The clerk of the supreme court, and not the clerk of the appellate division, should tax such costs and disbursements.⁷² Upon the decision of an appeal from a decision of a surrogate, it is proper to enter a judgment and to tax the cost.⁷³

⁶⁷*Dresser v. Brooks*, 2 N. Y. 559, 4 How. Pr. 207, 2 N. Y. Code Rep. 130. *Bouton v. Welch*, 59 App. Div. 288, 69 N. Y. Supp. 407.

⁶⁸*Beardsley Seythe Co. v. Foster*, 36 N. Y. 561, 34 How. Pr. 97. ⁷¹*Brown v. Leigh*, 50 N. Y. 427, 13 Abb. Pr. N. S. 305; Code Civ. Proc.

⁶⁹*Patten v. Stitt*, 50 N. Y. 591. § 311.

⁷⁰*Lesster v. Lawyers' Surety Co.*, 50 App. Div. 181, 189, 30 N. Y. Civ. Proc. Rep. 388, 63 N. Y. Supp. 804; ⁷²*Margulies v. Damrosch*, 23 Misc. 77, 51 N. Y. Supp. 833.

⁷³*Wadley v. Davis*, 38 Hun, 186.

CHAPTER XXX.

COSTS ON APPEALS.

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381. Statute.—Costs upon appeals are governed by § 3238 of the Code of Civil Procedure, which is as follows:

“Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:

“I. In an action specified in § 3228 of this act the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court.

“II. In every other action, and also where the final judgment appealed from is affirmed in part and reversed in part, costs may be awarded in like manner, in the discretion of the court.”

It will be noticed that unless the action is one of those specified in § 3228 of the Code of Civil Procedure, the costs of the appeal is in the discretion of the appellate court, although one of the parties succeeds wholly in his contention.

382. In general.—The party who succeeds on the main issue is entitled to the costs of the appeal.¹ A party must be successful upon all the main issues of the appeal to be entitled to costs.² Costs will not be allowed to either party if the appellant fails

¹*People ex rel. Ryder v. Kings* N. Y. 444; *Anonymous*, 12 Johns. County, 76 Hun, 71, 27 N. Y. Supp. 340; *Pickett v. Barron*, 29 Barb. 505; 857.

²*Williams v. Fitzhugh*, 44 Barb. 587; *Staford v. Mott*, 3 Paige, 100. 321, Modified on another point in 37

partly because his appeal is too broad.³ Costs will be allowed to neither when both succeed, and the order or judgment appealed from is modified;⁴ or both appeal and do not succeed;⁵ or one abandons his appeal and the other fails in his appeal⁶ or succeeds only in part;⁷ or where both parties appeal and the judgment is reversed because of errors committed by both parties.⁸

Where an appellant takes two appeals to review the same question, the appeal that is improperly brought will be dismissed with costs against the appellant.⁹ A respondent who took an appeal to secure an expression of the appellate court in case of reversal will be compelled to pay costs of his appeal upon an affirmance of the judgment. The fact that he only argued for an affirmance does not change this rule.¹⁰

If costs are discretionary upon the decision of an appeal, and the order is silent as to costs, none are awarded to either party.¹¹

If the appellate court makes an erroneous direction in regard to costs, the party feeling aggrieved thereby should move in that court for a modification of the order in that respect, and **not** make a motion in the court of original jurisdiction to correct the alleged error.¹²

383. Costs when appeal is taken from the judgment and order.—Costs cannot be taxed upon an appeal from the judgment and also from the order denying a motion for a new trial¹³ Subdi-

³*Newton v. Russell*, 87 N. Y. 527.

⁴*Re Scholle*, 14 Hun. 14.

⁵*Smith v. Savin*, 69 Hun. 311, 30 Abb. N. C. 192, 53 N. Y. S. R. 378, 23 N. Y. Supp. 568; *Delafield v. Westfield*, 41 App. Div. 24, 58 N. Y. Supp. 277; *Tompkins County v. Bristol*, 58 How. Pr. 3; *Salter v. Utica, & B. River R. Co.* 86 N. Y. 401.

⁶*Leftwich v. Clinton*, 4 Lans. 176.

⁷*Kiah v. Grenier*, 1 Thomp. & C. 388.

⁸*Sander v. New York & H. R. Co.* 42 App. Div. 618, 59 N. Y. Supp. 127.

⁹*Abbey v. Wheeler*, 170 N. Y. 122, 62 N. E. 1074.

¹⁰*Tompkins County v. Bristol*, 58 How. Pr. 3.

¹¹*Pennell v. Wilson*, 5 Robt. 674, 2 Robt. 505, 2 Abb. Pr. N. S. 466; *Nellis v. DeForrest*, 6 How. Pr. 413; *Savage v. Darrow*, 4 How. Pr. 74, 2 N. Y. Code Rep. 57.

¹²*Clark v. Sullivan*, 19 N. Y. Civ. Proc. Rep. 147, 31 N. Y. S. R. 756, 10 N. Y. Supp. 397; but see *Gray v. Hannah*, 3 Abb. Pr. N. S. 183.

¹³*Van Alen v. American Nat. Bank*, 10 Abb. Pr. N. S. 331; *West v. Lynch*, 1 N. Y. City Ct. Rep. 174; *Bullard v. Pearsall*, 46 How. Pr. 383, Affirmed in Court of Appeals, 46

vision 2 of § 3239 of the Code of Civil Procedure does not apply to an appeal from an interlocutory judgment and also from an order denying a new trial made under § 1010 of the Code of Civil Procedure, which latter section raises questions entirely distinct from those raised under the interlocutory judgment. The order and judgment referred to in § 3239 of the Code is an order refusing a new trial upon the merits, in which case appeals from both judgment and order are unnecessary.¹⁴ An appeal from a judgment and also from an order denying a motion for a new trial upon the ground of newly discovered evidence is not within the provisions of § 3239 subd. 2, and costs on each appeal can be allowed.¹⁵ If the appeal from the judgment is heard and decided, and later a separate appeal is taken from the order denying a new trial, costs upon both appeals may be allowed.¹⁶

384. Meaning of the word "argument."— The word "argument" in § 3251 of the Code of Civil Procedure is not to be construed to mean an oral argument only, but it means the submission to the court of a printed brief. The successful party is entitled to tax costs for argument, notwithstanding that the case was submitted without oral argument.¹⁷

385. Costs as affected by irregularities.— No costs will be allowed where the respondent consents to a reversal to correct an irregularity in the report of the referee.¹⁸ Nor will costs be allowed a successful appellant, even to abide the event, where he does not print his case as required by the court rules, but prints in small capitals or italics all evidence favorable to him.¹⁹

How. Pr. 530; *Syms v. New York*, 18 Abb. N. C. 459, 12 N. Y. Civ. 105 N. Y. 153, 6 N. Y. S. R. 830, 26 Proc. Rep. 121.

N. Y. Week. Dig. 135, 11 N. E. 369; ¹⁴*Malcolm v. Hamill*, 65 How. Pr. 506, 4 N. Y. Civ. Proc. Rep. 221. Code Civ. Proc. § 3239.

¹⁵*Garrett v. Wood*, 61 App. Div. 293, 70 N. Y. Supp. 358. ¹⁶*Schulteis v. McInerney*, 27 Abb. N. C. 193, 24 N. Y. Civ. Proc. Rep. 157, 37 N. Y. S. R. 537, 13 N. Y. Supp. 684.

¹⁷*Streep v. McLoughlin*, 36 Misc. 165, 72 N. Y. Supp. 1061. ¹⁸*Keeler v. Barrett's P. & H. Dye-*

ing Establishment, 22 Jones & S. 550, ¹⁹*Fuchs v. Wm. H. Sweeney Mfg.*

386. Several appeals in the same case.— The parties to two or more actions can stipulate that they be tried together, and if they so stipulate only one bill of costs will be allowed;²⁰ or they may stipulate that costs may be taxed in each.²¹ On the other hand, if there is more than one appeal in the same case, although all are embraced in one notice of appeal, costs will be allowed in each case, and disbursements in one.²²

387. Appeal to correct an error of computation.— Where a mistake has been made in computation, and the attention of the court below has not been called to it and a chance given to that court to correct the mistake, and the judgment is modified only in that respect, costs will be given to the respondent.²³ The respondent, in such a case, will relieve himself of all liability for costs if he serves upon his opponent a written offer to allow a deduction of the amount of the error.²⁴ After such an offer a judgment was modified, with costs to the respondent, where the error was shared by the referee and counsel on both sides and consisted in rejecting certain items which were supposed to be barred by the statute of limitations.²⁵ Where the plaintiff gives evidence of matter not embraced within his complaint and the defendant objects, without stating the grounds of his objection, a new trial will be granted, costs to abide the event, or the judgment will be reduced that amount, with costs to the plaintiff. The defendant cannot defeat the plaintiff's right to costs, because he did not direct the attention of the trial court to the exact objection to the evidence.²⁶

Co. 34 N. Y. S. R. 925, 12 N. Y. Supp. 13 Jones & S. 1. Affirmed in 82 N. Y. 870. 1: *Bank of Syracuse v. Wisconsin*

²⁰*King v. Brush*, 5 Alb. L. J. 137. *M. & F. Ins. Co. Bank*, 36 N. Y. S.

²¹*Hauselt v. Godfrey*, 3 N. Y. Civ. R. 584, 12 N. Y. Supp. 952.
Proc. Rep. 116. ²³*Kemple v. Darrow*, 7 Jones & S.

²²*Brassington v. Rohrs*, 3 Misc. 447.

262, 52 N. Y. S. R. 252, 22 N. Y. ²⁵*Perrine v. Hotchkiss*, 2 Thomp. & Supp. 1053; *Stanton v. King*, 76 N. C. 370. .

Y. 585; *Goodridge v. Connor*, 66 ²⁶*Zimmerman v. Long Island R. Co.* 14 App. Div. 562, 43 N. Y. Supp.

²⁴*Clark v. Geery*, 8 Jones & S. 227; 883.

Thomson v. British N. A.

388. Right to appeal lost by accepting costs.— It is well settled that a party who accepts the part of an order favorable to himself is thereby bound by the whole order, and cannot appeal therefrom. A party who receives the costs which the opposite party is directed to pay as the condition of a favor cannot appeal from the order granting the favor.²⁷ If the money is received before the appeal is taken, the right to appeal is waived; if after the appeal is taken, the appeal is waived.²⁸ But where the payment of costs is absolute, and is not made dependent upon the accepting of the favor asked, the party may appeal after receiving the costs.²⁹ A party who is coerced into paying costs by an execution is not thereby deprived of his right to appeal.³⁰ The acceptance by the attorney of the costs allowed in the judgment precludes the party from appealing from the judgment.³¹

389. Costs of a reargument.— Where a case is reargued at the instance of the court by reason of the disqualification of one or more of its members, or because of an even division of the court as constituted at the time of the argument, and, on account of the change of the personnel of the court, an opportunity is given to break the deadlock, or whatever the reason, so long as no blame attaches to the party claiming the costs, he is entitled to as many argument fees as he makes arguments. But he is not entitled to have the item of \$20 before notice of argument taxed more than once.³²

²⁷*Taussig v. Hart*, 1 Jones & S. 198, 38 N. Y. Supp. 1112; *Knapp v. 157*; *Platz v. Cohoes*, 8 Abb. N. C. 392; *Lewis v. Irving F. Ins. Co.* 15 Abb. 140, note; *Lupton v. Jewett*, 1 Robt. 639, 19 Abb. Pr. 320; *Smith v. Sarin*, 69 Hun, 311, 30 Abb. N. C. 192, 53 N. Y. S. R. 378, 23 N. Y. Supp. 568.

²⁸*Radway v. Graham*, 4 Abb. Pr. 468; *Wood v. Richardson*, 91 Hun, 332, 72 N. Y. S. R. 103, 36 N. Y. Supp. 1001; *Lewis v. Irving F. Ins. Co.* 15 Abb. Pr. 140, note; *Logeling v. New York Elev. R. Co.* 5 App. Div. 198, 38 N. Y. Supp. 1112; *Knapp v. Brown*, 45 N. Y. 207.

²⁹*Farmers' Loan & T. Co. v. Bankers & M. Teleg. Co.* 109 N. Y. 342, 16 N. E. 539; *Re Amsterdam Water Comrs.* 36 Hun, 534.

³⁰*Burch v. Newbury*, 4 How. Pr. 145.

³¹*Carl v. Oakley*, 97 N. Y. 633; *Bennett v. Van Syckel*, 18 N. Y. 481.

³²*Roberson v. Rochester Folding Box Co.* 68 App. Div. 528, 73 N. Y. Supp. 898; *Miller v. King*, 32 App. Div. 349, 52 N. Y. Supp. 1041; *Sweet*

390. Costs in the court of appeals. *a. Meaning of the words "with costs."*—The words "with costs," when used by the court of appeals in an order of affirmance or reversal, where the allowance of costs is discretionary, means costs in that court only.³³ If the successful party is entitled under the order to a final judgment, he can tax only the costs that have theretofore been awarded him, in addition to the costs in the court of appeals. If the courts below have awarded costs to his opponent, they have not exercised their discretion in his favor, and therefore he is not entitled to costs in those courts.³⁴ In an equity action the trial court, in entering up judgment upon a remittitur from the court of appeals, which orders judgment absolute, "with costs," for a party who has not been allowed costs theretofore, may grant the successful party costs in the trial court and an additional allowance.³⁵ If the court of appeals assumes to deal with the whole subject of costs, and wipes out and reverses the judgment or decree appealed from, with costs, that includes all the costs in the inferior courts.³⁶ In an equity action the trial court, in entering up judgment absolute upon a remittitur from the court of appeals for a party, "with costs," may, where he had been allowed by the court of appeals costs in the trial court, also give him an additional allowance.³⁷ In an action at law the trial court may, upon entering judgment absolute for a party upon a remittitur from the court of appeals, grant an additional allowance for the first time.³⁸ In equity actions, if the successful

v. Chapman, 53 How. Pr. 253; 13 N. Y. Week. Dig. 128; *People ex Guckenheimer v. Angerine*, 16 Hun. rel. *Morris v. Randall*, 8 Daly, 81. 453.

³³*Re Amsterdam Water Comrs.* 104 20 N. Y. S. R. 884, 3 N. Y. Supp. N. Y. 677, 1 Silv. Ct. App. 351, 25 297; *People ex rel. Morris v. Randall*, N. Y. Week. Dig. 393, 5 N. Y. S. R. 8 Daly, 81; *Re Protestant Episcopal* 744, 10 N. E. 545; *Sisters of Charity Public School*, 86 N. Y. 396.

v. Kelly, 68 N. Y. 628; *Re Hood*, 17 ³⁵*Barnard v. Hall*, 143 N. Y. 339, N. Y. S. R. 705, 1 N. Y. Supp. 833; 38 N. E. 301.

People v. Mercantile Credit Guaranty ³⁶*Re Hood*, 30 Hun. 472.

Co. 35 Misc. 755, 72 N. Y. Supp. 373; ³⁷*Hascall v. King*, 165 N. Y. 288, *Hurley v. Brown*, 55 App. Div. 8, 59 N. E. 132.

67 N. Y. Supp. 279; *Byrnes v. Baer*. ³⁸*Jermain v. Lake Shore & M. S.*

party has not been allowed costs in the appellate division upon the original appeal he cannot tax the costs in that court.³⁹ The only remedy of the party in such event is by motion in the court of appeals to amend the remittitur to allow him costs in the appellate division, or else for permission to apply to that court for costs, so that it may exercise its discretion in his favor.⁴⁰ After a final verdict in favor of a party who has had successive defeats, or a reversal which vacates all previous orders respecting costs, the successful party has a right to apply to the court for the proper order for costs in the proceedings in which he has been unjustly vexed.⁴¹

b. How the order of the court is interpreted or corrected.—There is no power in the courts below to award costs in those courts, after the court of appeals has passed upon the whole question of costs. The court below must enter up the judgment directed by the court of appeals, without changing it in any particular.⁴² It cannot allow separate bills of costs to different defendants for the first time.⁴³ Where the court of appeals affirms the judgments of the special term and the appellate division, the costs adjudicated in those courts become the judgment of the court of appeals. The courts below cannot alter the judgment of this court in that respect any more than in any other respect. If the appellant wishes to have the costs at special term and the appellate division reduced, he should return the remittitur to the court of appeals and make his motion to amend it in that re-

R. Co. 31 Hun, 558; *Savage v. Allen*, 2 Thomp. & C. 474; *Burdett v. Lowe*, 22 Hun, 588; *Parrott v. Sawyer*, 26 Hun, 466, Refusing to follow *Eldridge v. Strentz*, 7 Jones & S. 295; *McGregor v. Buell*, 1 Keyes, 153, citing *Von Keller v. Schulting*, 45 How. Pr. 139.

³⁹*Thomas v. Evans*, 50 Hun, 441, 20 N. Y. S. R. 884, 3 N. Y. Supp. 297.

⁴⁰*Helek v. Reinheimer*, 28 N. Y. Week. Dig. 347, 14 N. Y. S. R. 465.

⁴¹*Benjamin v. Ver Nooy*, 36 App. Div. 581, 29 N. Y. Civ. Proc. Rep. 120, 55 N. Y. Supp. 796; *Brown v. Farmers' Loan & T. Co.* 24 Abb. N. C. 160, 18 N. Y. Civ. Proc. Rep. 131, 9 N. Y. Supp. 337.

⁴²*People v. Mercantile Credit Guaranty Co.* 35 Misc. 755, 72 N. Y. Supp. 373; *Re Hood*, 17 N. Y. S. R. 705, 1 N. Y. Supp. 833.

⁴³*Re New York, W. S. & B. R. Co.* 28 Hun, 505.

spect.⁴⁴ A defendant may be allowed costs in different actions, where there is a stipulation that but one set of papers be made up, and that the other actions abide the result of that one,—especially where the plaintiff had entered up separate bills of costs in each case upon the decision in the trial court and in the general term, because this shows how the stipulation was construed.⁴⁵ If there was any doubt in the mind of the successful litigants, they should have moved in the court of appeals to amend the remittitur.⁴⁶ The court below cannot modify the costs granted in that court to the successful party, after judgment absolute has been rendered in the court of appeals. If any change is desired the application must be made to the court of appeals.⁴⁷ The appellate division cannot modify the decision of the court of appeals by deducting its costs after the latter has reversed the judgment of the former, unless the plaintiff stipulates to deduct certain sums from the judgment; but if the stipulation is given, the judgment is affirmed. The court of appeals could have made that deduction if it had desired.⁴⁸ The danger of appealing from a judgment of the appellate division ordering a new trial is well illustrated in a case where the plaintiff sued for an accounting, and the complaint was dismissed, the general term ordered a new trial, and the defendant appealed to the court of appeals with the usual stipulation. That court ordered judgment absolute for the plaintiff, “with costs.” Upon the reference ordered upon the accounting, it was found that there was a balance due the defendant, but that he was not entitled to judgment for damages, nor could he tax his disbursements; but that the plaintiff was entitled to a judgment for his costs.⁴⁹

⁴⁴*Sheridan v. Andrews*, 80 N. Y. 648, 10 N. Y. Week. Dig. 117. ⁴⁵*Nicoll v. Burke*, 13 Jones & S. 526.

⁴⁶*Hauselt v. Godfrey*, 11 Daly, 276. ⁴⁷*Rust v. Hauselt*, 14 Jones & S.

⁴⁸*Isola v. Weber*, 12 App. Div. 267, 38, 8 Abb. N. C. 148.
42 N. Y. Supp. 615.

⁴⁹*Sheridan v. Andrews*, 80 N. Y. 648, 10 N. Y. Week. Dig. 117.

c. Meaning of the words "with costs to abide the event."—Under § 3238 of the Code of Civil Procedure the court of appeals on the reversal of a judgment and the granting of a new trial has power to award costs absolutely to either party, or to abide the event. "To abide the event" means, in legal or equitable actions, all the costs of the action up to and including this court.⁵⁰ Where the court of appeals reverses a judgment, with costs to abide the event, the party who is finally successful upon all the main issues is entitled to tax all the costs of the action, including the costs in the court of appeals, and, if the trial court so directs, the costs of the last trial.⁵¹ But where neither party is entirely successful upon the final trial, the costs of the entire action rests in the discretion of the trial court.⁵² If it is an action where the prevailing party is entitled to costs as a matter of right, he can tax all the costs of the action, including those of the last trial, without any direction of the trial court.⁵³ But in an action at law where, upon a reversal, the costs are given to one party to abide the event, and the other party is eventually successful, the costs in the court of appeals cannot be taxed by anyone. The other costs, however, can be taxed by the successful party.⁵⁴

d. Meaning of the words "without costs."—The words "without costs" apply only to the costs in the court of appeals.⁵⁵ Where the court of appeals reverses a judgment, "without costs," the court below cannot for the first time add the costs of the

⁵⁰*Francy v. Smith*, 126 N. Y. 658, 37 N. Y. S. R. 480, 27 N. E. 559; *Isaacs v. New York Plaster Works*, 11 Jones & S. 397, 4 Abb. N. C. 4; *Howell v. Van Sicken*, 8 Hun, 524, affirmed without opinion in 70 N. Y. 469.

⁵¹*Mott v. Consumers Ice Co.* 8 N. Y. 595, 4 Abb. N. C. 1. ⁵²*Belt v. American Cent. Ins. Co.* 33 App. Div. 239, 53 N. Y. Supp. 363. ⁵³*Powers v. Manhattan R. Co.* 20 N. Y. Civ. Proc. Rep. 78. 14 N. Y. 3 Abb. App. Dec. 86, 33 How. Pr. 450. ⁵⁴*Daly*, 244; *Thomas v. Evans*, 50 Hun, 441, 20 N. Y. S. R. 884, 3 N. Y. Supp. 297; *McGregor v. Buell*, 1 Keyes, 153, N. Y. Civ. Proc. Rep. 78. 14 N. Y. 3 Abb. App. Dec. 86, 33 How. Pr. 450. ⁵⁵*Manderille v. Avery*, 44 N. Y. S. R. 1, 17 N. Y. Supp. 429.

general term.⁵⁶ Where the court of appeals reverses a judgment, "without costs," and sends the case back for the court of original jurisdiction to proceed upon according to the law as laid down by the court of appeals, the court below has a right to pass upon the question of costs *de novo*.⁵⁷

Where the defeated party in the court of appeals, appeals to the United States Supreme Court, which reverses, with costs to the appellant in that court, several remedies given by the state courts, and leaves the judgment in other respects unchanged, and the court of appeals sends the remittitur from the United States Supreme Court to the special term, "without costs," the court of appeals has disposed of the question of costs in the state courts, and the special term has no right to allow costs to any party when it enters up judgment upon the remittitur.⁵⁸ The burden is on the party against whom costs were given in the lower courts to prove that the court of appeals has exempted him from the payment of those costs when it modifies a judgment, "without costs." This can be determined upon a motion in the trial court, and the evidence must be found in the opinion and the remittitur of the court of appeals.⁵⁹

When the court of appeals in an equity action affirms a judgment and orders judgment absolute, "without costs to either party," that means all the costs in the action, including those in that court.⁶⁰

e. When the costs are a matter of right.—An altogether different question is presented when the plaintiff seeks to recover a money judgment, or a judgment that entitles him to costs, as of course. Then the successful party is entitled, upon entry of final judgment, to costs for all regular proceedings in the trial

⁵⁶*McGregor v. Buell*, 1 Keyes, 153, 3 Abb. App. Dec. 86, 33 How. Pr. 450. ⁵⁹*Callanan v. Gilman*, 23 Jones & S. 511, 18 N. Y. S. R. 397, 23 N. Y.

⁵⁷*Hogan v. Kavanaugh*, 139 N. Y. Week. Dig. 406, 2 N. Y. Supp. 702. 620, 34 N. E. 1046.

⁶⁰*Patten v. Stitt*, 50 N. Y. 591, ⁵⁸*Stercens v. Central Nat. Bank*, 163 Affirming 2 Jones & S. 346. N. Y. 560, 61 N. E. 904.

court, except motion costs that may have been awarded to his opponent, either absolutely or to abide the event,⁶¹ also to all the costs of all the appeals, unless they were awarded to his opponent, either absolutely or to abide the event, and the judgment or order thus awarding costs stands unreversed. If the judgment or order has been reversed, costs of that appeal will be determined by the final issue of the action.⁶² The court of appeals in such an action has discretion as to costs only when the judgment is reversed in part and affirmed in part, or where a new trial is granted. The addition to a judgment in that court of the words "with costs" or "without costs" cannot affect the right of the prevailing party.⁶³ A plaintiff is entitled to tax the costs in the appellate division, although they were awarded to the defendant to abide the event, when the court of appeals orders judgment for the plaintiff, "with costs," and the prevailing party is entitled to costs, as of course.⁶⁴

f. When the court of appeals has power to review the question of costs.—The court of appeals will review the determination of the courts below, even upon a discretionary order as to costs, where it appears that the decision was based on the ground of lack of power to grant the application.⁶⁵ An appeal lies to the court of appeals from the conditions imposed in an order of reversal that the appellant should not bring an action against the respondent. Such a condition attached to the order cannot stand, but such a condition attached to the allowance of costs is

⁶¹*Price v. Price*, 61 Hun, 604, 16 N. Y. Supp. 359; *Murtha v. Curley*, 92 N. Y. 360; *Re Protestant Episcopal Public School*, 86 N. Y. 397; *Murtha v. Curley*, 92 N. Y. 359. 49 N. Y. 660; *McIntyre v. German Sav. Bank*, 59 Hun, 536, 20 N. Y. Civ. Proc. Rep. 209, 37 N. Y. S. R. 545, 13 N. Y. Supp. 674.

⁶²*Donovan v. Vandemark*, 22 Hun, 307. *Contra*, *Bigler v. Pinkney*, 24 Hun, 224. The latter case is not a well-considered case and is at variance with the trend of decisions. ⁶⁴*Murtha v. Curley*, 92 N. Y. 359, 65 How. Pr. 867, 3 N. Y. Civ. Proc. Rep. 366; Explained in *Re Amsterdam Water Comrs.*, 104 N. Y. 677, 10 N. E. 545; *Revere Copper Co. v. Dimmoek*, 29 Hun, 299.

⁶³*Tompkins County v. Bristol*, 58 How. Pr. 3; *Combs v. Combs*, 25 Hun, 279; *Ayers v. Western R. Corp.* ⁶⁵*Tolman v. Syracuse, B. & N. Y. R. Co.* 92 N. Y. 353.

proper.⁶⁶ An appeal lies to the court of appeals from an order reversing an order of the special term and imposing costs absolutely upon the respondent, because in this respect it is a final determination.⁶⁷ The court of appeals can adjust the payment of costs where the plaintiff failed in his appeal against two respondents, and therefore would have to pay to both, and one of these respondents failed as to the other, by simply ordering the plaintiff to pay one bill of costs to the respondent who succeeded as to all parties, instead of ordering the plaintiff to pay costs to the successful respondent, and he to the other.⁶⁸

g. When the decision of one appeal makes the consideration of another appeal useless.—In an action for the construction of a will and an accounting, where both parties appeal, the appeal on the accounting was not considered, as it could not be until it was settled that the plaintiff was entitled to a construction of the will. When this was decided adversely to him, costs were adjusted as if there had been but one appeal.⁶⁹

h. When the question was not presented to the court below.—The court of appeals in modifying a judgment will not allow the appellant costs in the appellate division, when he succeeds in the court of appeals upon a point not raised below.⁷⁰ And it has refused to allow either party costs in any court, where one party was right on the pleading, but in default upon the payment.⁷¹

i. When there are several parties on the side entitled to costs.—The court of appeals may award one bill of costs to several defendants who have answered separately and have been allowed separate bills of costs below. In such case “costs to respondents” means one bill of costs. Upon an affirmance of a judgment in an equity action the court of appeals cannot review the

⁶⁶*Chapin v. Foster*, 101 N. Y. 1, 3 N. E. 786.

⁷⁰*Griswold v. Metropolitan Elev. R. Co.* 122 N. Y. 640, 3 Silv. Ct. App. 126. 33 N. Y. S. R. 642, 25 N. E. 361.

⁶⁷*Bergen v. Carman*, 79 N. Y. 146.
⁶⁸*Merchants & T. Nat. Bank v. New York*, 97 N. Y. 355.

⁷¹*Morris v. Wheeler*, 45 N. Y. 708.

⁶⁹*Chipman v. Montgomery*, 63 N. Y. 221.

discretion of the court below.⁷² Where the court of appeals reverses a judgment wholly as to one of two defendants, and orders judgment absolute for him, costs are properly awarded to him.⁷³ Even in legal actions one of two defendants, who succeeds in reversing a judgment as to him, is not entitled to costs, as of course, because the affirmance was only in part and costs were in the discretion of the court, under subd. 2, of § 3238 of the Code of Civil Procedure.⁷⁴ Where one attorney appears for a plaintiff in partition, and also for the guardian of an infant, two bills of costs will not be taxed in the absence of explicit directions to that effect.⁷⁵

Where the court of appeals affirms a judgment with costs to the respondents, and there are two respondents, one the plaintiff and the other defendant, and the issue between the defendants had no relation to the main issue, two bills of costs may be awarded.⁷⁶ The successful party may tax two bills of costs where the appeal was from two orders, and the remittitur says that "the appeals from the orders of the appellate division of the supreme court herein be, and the same are, dismissed with costs."⁷⁷

j. Amount of costs in the court of appeals.—Upon an appeal from an order to the court of appeals, full costs are allowed.⁷⁹ A defendant who is prosecuted for an act done as a public officer is entitled to double costs in the court of appeals, as well as in the court below.⁸⁰

⁷²*Van Gelder v. Van Gelder*, 84 N. Y. 658; *Herrington v. Robertson*, 71 N. Y. 280; *Taylor v. Root*, 48 N. Y. 687; *Von Keller v. Schulting*, 45 How. Pr. 139.

⁷³*Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459.

⁷⁴*Metropolitan Elcr. R. Co. v. Duggin*, 33 N. Y. S. R. 992, 11 N. Y. Supp. 819.

⁷⁵*Hulstead v. Halstead*, 2 Thomp. & C. 673.

⁷⁶*Reynolds v. Aetna L. Ins. Co.* 30 Misc. 152, 61 N. Y. Supp. 901.

⁷⁷*Lesster v. Lawyers' Surety Co.* 29 Misc. 779, 62 N. Y. Supp. 430.

⁷⁹Code Civ. Proc. § 3239; *Hall v. Emmons*, 40 How. Pr. 137, 9 Abb. Pr. N. S. 453, note; *White v. Anthony*, 23 N. Y. 164; *Webb v. Norton*, 10 How. Pr. 117; *Tauton v. Groh*, 9 Abb. Pr. N. S. 453; *Brown v. Leigh*, 52 N. Y. 78.

⁸⁰*Burkle v. Luce*, 1 N. Y. 239, 3 How. Pr. 236.

k. Punitive costs.—Where there is no merit in the appeal by the defendant the court will add 10 per cent to the amount of the judgment under § 3251 of the Code of Civil Procedure.⁸¹ This is computed upon the judgment of the trial court and upon that of the appellate division, but not upon the interest on the judgments.⁸² Punitive costs of 5 per cent were allowed to the plaintiff against the defendants for a delay caused by their appeal, which had no merit, where the action was to recover money out of which the defendants had tried to defraud the plaintiff.⁸³ Punitive costs are properly awarded where the appeal has no merit and the appellant submits no points and points out no error in the judgment of the court below.⁸⁴ But they will not be awarded against a defendant, where he has appealed from an erroneous exclusion of evidence, and upon the new trial granted upon his appeal the evidence given by him falls far short of his offer upon the former trial, because he has caused no delay by his appeals, although his last appeal had very little merit.⁸⁵ Where the same question has been decided against the appellant in another case, and the appellant still persists in its appeal, punitive costs are properly awarded under § 3251 of the Code of Civil Procedure.⁸⁶ But where the appeal presents debatable questions that have not been settled at the time the appeal is taken, the appellant should not be punished by way of increased costs.⁸⁷

l. Costs allowed upon withdrawing appeal.—An appellant was allowed to withdraw an appeal “upon payment of all costs

⁸¹*Cohen v. New York*, 128 N. Y. 594, 3 Silv. Ct. App. 501, 21 N. Y. Civ. Proc. Rep. 124, 38 N. Y. S. R. 846, 27 N. E. 1074; *Peterson v. Dickel*, 8 Abb. Pr. 259.

⁸³*Day v. Roth*, 18 N. Y. 448.

⁸⁴*Warner v. Lessler*, 33 N. Y. 296.

⁸⁵*Blazy v. McLean*, 146 N. Y. 390, 40 N. E. 733.

⁸⁶*Jackson v. Rochester*, 124 N. Y.

⁸²*Adams v. Perkins*, 25 How. Pr. 368; *Degener v. Underwood*, 31 Abb. S. R. 73, 26 N. E. 326.

N. C. 479, 62 N. Y. S. R. 121, 30 N. Y. Supp. 399; *Becker v. Metropolitan Elev. R. Co.* 30 N. Y. Supp. 400.

⁸⁷*Tisdale v. Delaware & H. Canal*

before notice of argument." The respondent moved to amend the remittitur and decision so that it would read "upon payment of all costs in this action in all courts, incurred before the notice of argument in this court." The court held that the decision meant costs in this court.⁸⁸

m. Terms imposed upon opening a default.—A default regularly taken was opened upon payment of taxable costs of the term, of opposing the motion, and a counsel fee of \$50 for attending, prepared to argue the case.⁸⁹ Where an appeal is dismissed after an argument on its merits, general costs are allowed, and not motion costs,⁹⁰ except where the respondent should have moved to dismiss the appeal, instead of noticing it for argument.⁹¹ If the appeal is dismissed upon a motion for that purpose, only motion costs can be collected.⁹²

n. Waiver of right to appeal from the interpretation of the court below of the order of the court of appeals.—A party waives his right to have the question of the amount of costs allowed to him by the court of appeals reviewed by the court, where he enters up judgment which is satisfied, and then appeals from the order. He must refrain from entering the judgment, but must appeal from the decision of the court as to the amount of costs, in order that all which he may be entitled to may form part of the judgment for all time. There can be but one final judgment in an action.⁹³

o. Allowances to counsel in cases where the offense charged is punishable with death.—Upon an appeal from a sentence of death, the court of appeals can allow counsel a sum for compensation, not exceeding \$500 besides disbursements for services in

Co. 116 N. Y. 416, 26 N. Y. S. R. 857, 22 N. E. 760.

⁸⁸*Broadway Sav. Inst. v. Pelham*, 148 N. Y. 737, 42 N. E. 722.

⁸⁹*Slade v. Warren*, 1 N. Y. 431.

⁹⁰*White v. Anthony*, 23 N. Y. 164; *Webb v. Norton*, 10 How. Pr. 117.

⁹¹*Williams v. Fitch*, 15 Barb. 654; *Webb v. Norton*, 10 How. Pr. 117.

⁹²*Webb v. Norton*, 10 How. Pr. 117.

⁹³*Prentiss v. Bowden*, 14 Misc. 185, 2 N. Y. Anno. Cas. 163, 25 N. Y. Civ.

Proc. Rep. 144, 70 N. Y. S. R. 517, 35 N. Y. Supp. 653.

that court, although the trial court had made an allowance of \$500 and disbursements for the service of counsel there.⁹⁴ Section 458 of the Code of Criminal Procedure requires a case to be made the same as in civil actions. Counsel must aid the court by preparing a case, and the failure to do this is properly taken into consideration in passing upon his application for compensation.⁹⁵

391. Costs in the appellate division. *a. In general.*—Every court has a right to interpret its own orders, and therefore the different appellate divisions may interpret the same order differently, because different things were meant, although they used the same words. It must be borne in mind that where a party is entitled to costs, of course, as specified in § 3228 of the Code of Civil Procedure, no court can take away from him those costs. The party finally successful is entitled, upon the entry of a final judgment, to tax costs for all regular proceedings in the trial court, except such motion costs as may have been awarded to his opponent, either absolutely or to abide the event, and to tax costs of all appeals unless the court had power, under §§ 3238 and 3239 of the Code of Civil Procedure, to award, and did actually award, the costs of the appeal to his opponent, either absolutely or to abide the event. This right to costs the courts cannot take away. If the judgment is affirmed or reversed in such an action, and no mention is made of the costs, the prevailing party is entitled to tax a full bill of costs of the appeal.⁹⁶ In all equity actions except where a money judgment is demanded, the costs of all the courts is in the discretion of the court, and it is this class of cases where the difficulty arises in interpreting the orders of the court.

b. Meaning of the words "with costs."—In the old general

⁹⁴*People v. Ferraro*, 162 N. Y. 545, 57 N. E. 167. ⁹⁵*Combs v. Combs*, 25 Hun, 279.

⁹⁶*People v. Barone*, 161 N. Y. 475, 55 N. E. 1091.

term, where a judgment was reversed "with costs," which *was*, in effect, a dismissal of the complaint, as a new trial was not granted, it was held that this meant costs in the trial court, as well as in the general term. If the trial court had dismissed the complaint "without costs," and the general term affirmed "with costs," that would only mean costs in the general term.⁹⁷ On the other hand it has been held in the appellate division, first and second departments, that where the plaintiff wins in an equity action, without costs, and the appellate division reverses, with costs, and the complaint is dismissed, that the defendant is not entitled to costs of the trial. If that had been meant, the court would have said "judgment reversed, with costs, and complaint dismissed, with costs."⁹⁸

c. Costs of an order.—The proper sum to be taxed by the prevailing party on a decision of the appellate division affirming an order, "with costs," is \$10 and disbursements. The allowance of costs is enough authority for the clerk to tax disbursements.⁹⁹ But if this is an interlocutory order, disbursements are incidental and must be expressly allowed, to be taxed.¹⁰⁰ But no judgment should be entered for these costs; they are to be collected like motion costs.¹⁰¹ Where an order is affirmed, "with costs," and the party to whom they are allowed is afterwards defeated on the trial, these costs must be deducted from the costs of the party ultimately successful.¹⁰² If these costs had been allowed to the party finally successful, he could include these as well as all other unpaid costs in his final judgment.

⁹⁷*Schoonmaker v. Bonnie*, 51 Hun. N. Y. S. R. 199, 21 N. Y. Supp. 585; 34, 16 N. Y. Civ. Proc. Rep. 64, 20 *Jones v. Sherman*, 8 N. Y. S. R. 344; N. Y. S. R. 428, 3 N. Y. Supp. 492. *Phipps v. Carman*, 26 Hun. 518.

⁹⁸*Hurley v. Brown*, 55 App. Div. 8, 67 N. Y. Supp. 279; *Von Keller v. Schulling*, 45 How. Pr. 139; *Re Street Opening*, 34 App. Div. 500, 54 N. Y. Supp. 516.

¹⁰⁰*Burnell v. Coles*, 26 Misc. 378, 56 N. Y. Supp. 208.

¹⁰¹*Re Brasier*, 13 Daly, 245, 2 How. Pr. N. S. 154.

⁹⁹*Cassidy v. McFarland*, 2 Misc. 91, 189, 23 N. Y. Civ. Proc. Rep. 65, 50

¹⁰²*Stevenson v. Pusch*, 40 How. Pr.

d. Meaning of the words "with costs to abide the event."—Where a judgment is reversed, with costs to abide the event, it means that the party ultimately successful may tax all costs up to that time.¹⁰³ It makes no difference whether the successful party ultimately obtains judgment upon a new trial or by an appeal to the court of appeals.¹⁰⁴ The successful party may tax the costs of the appeal and of both trials in an action at law, and also in an action in equity if the trial court gives him the costs of the last trial.¹⁰⁵ The costs of the appeal are his, because they were made to abide the event, and that is with him.¹⁰⁷ But if he is limited in the amount of costs that he can tax to the amount of his recovery, that limitation applies to all the costs in the action.¹⁰⁸ If the verdict is more than \$50, although it reaches that figure only by computing interest to the day of the last trial, still the verdict carries, in an action at law, the costs of the appeal and the two trials.¹⁰⁹ On the other hand, some courts have construed the words "with costs to abide the event" in their own orders to mean "costs to the appellant to abide the event," holding that the appeal was caused by the error of the respondent and he should not be allowed to profit by his own mistake;¹¹⁰ nor could

¹⁰³*Comly v. New York*, 1 N. Y. Civ. Proc. Rep. 306; *Lotti v. Krakauer*, 1 N. Y. City Ct. Rep. 60, 1 N. Y. Civ. Proc. Rep. 312, note; *Miller v. King*, 32 App. Div. 349, 52 N. Y. Supp. 1041; *Union Trust Co. v. Whiton*, 78 N. Y. 491; *First Nat. Bank v. Fourth Nat. Bank*, 84 N. Y. 469, 60 How. Pr. 436; *Loring v. Morrison*, 25 App. Div. 139, 5 N. Y. Anno. Cas. 151, 48 N. Y. Supp. 975; *Koon v. Thurman*, 2 Hill, 357; *Herbst v. Vacuum Oil Co.* 50 N. Y. S. R. 555, 22 N. Y. Supp. 42; *Van Bussum v. Metropolitan L. Ins. Co.* 16 Misc. 40, 73 N. Y. S. R. 285, 37 N. Y. Supp. 665.

¹⁰⁴*Sanders v. Townshend*, 11 Abb. N. C. 217, 63 How. Pr. 343.

¹⁰⁵*Smith v. Smith*, 22 App. Div. 319, 5 N. Y. Anno. Cas. 47, 47 N. Y. Supp. 987.

¹⁰⁷*Francy v. Smith*, 126 N. Y. 658, 27 N. E. 559; *Koon v. Thurman*, 2 Hill, 357.

¹⁰⁸*Snyder v. Collins*, 12 Hun, 383.

¹⁰⁹*Loring v. Morrison*, 25 App. Div. 139, 5 N. Y. Anno. Cas. 151, 48 N. Y. Supp. 975.

¹¹⁰*Union Trust Co. v. Whiton*, 78

he tax the costs of the first trial, as that had been done away with.¹¹¹ The contrary has been held as to the costs of the first trial.¹¹²

e. Meaning of the words "with costs to the appellant to abide the event."—Where "costs are awarded to the appellant to abide the event" that means the costs of the trial as well as of the appeal, and if the respondent again wins, he cannot tax the costs of the first trial, nor of the appeal.¹¹³ On the other hand, it has been held that such a disposition of the costs by the appellate court referred only to the costs in that court.¹¹⁴ See subd. *a*, *supra*.

f. Meaning of the words "without costs."—The words "without costs" in an order of reversal mean without costs of the appeal. The successful party in such a case will, in an action at law, tax all costs, except those in the appellate court.¹¹⁵

g. Exceptions ordered heard at the appellate division in the first instance.—Full costs are allowed in the appellate court upon the decision of exceptions ordered heard at the appellate division in the first instance, even if that court reduces the amount of the verdict, but not below \$50.¹¹⁶ If the appellant also appeals from the order of the trial court denying a new trial,

N. Y. 491, Affirming 17 Hun, 593; ¹¹⁴*Howell v. Van Sielen*, 8 Hun. *Abendroth v. Durant*, 9 N. Y. Civ. 524, Affirmed in 70 N. Y. 595, 4 Abb. Proc. Rep. 446. Affirmed in 48 Hun, N. C. 1; *Buch v. Geraty*, 31 Misc. 22, 16; *Sheridan v. Genet*, 1 N. Y. Civ. 62 N. Y. Supp. 1125; *Belt v. American Cent. Ins. Co.* 33 App. Div. 239, Proc. Rep. 309 note.

¹¹¹*Lydd v. Kenny*, 1 N. Y. Civ. 53 N. Y. Supp. 363; *Marx v. Mc-Proc. Rep. (McCarty)* 310, note; *Cloud*, 21 N. Y. S. R. 957, 3 N. Y. *Starr Cash Car Co. v. Reinhardt*, 6 Supp. 74; *Donovan v. Board of Edu- Misc. 365, 56 N. Y. S. R. 404, 26 N. cation*, 1 N. Y. Civ. Proc. Rep. 311, Y. Supp. 746, note; *Bannerman v. Quackenbush*, 2

¹¹²*Durant v. Abendroth*, 48 Hun, 16, 1 N. Y. Supp. 538; *House v. Lock- N. Y. City Ct. Rep. 172, 2 How. Pr. wood*, 48 Hun, 550, 1 N. Y. Supp. N. S. 82, 7 N. Y. Civ. Proc. Rep. 428.

¹¹³*Elliott v. Luengene*, 19 Misc. 428, 43 N. Y. Supp. 1140; *Cochran v. Gottwald*, 10 Jones & S. 214.

¹¹⁵*Sander v. New York & H. R. Co.* 56 App. Div. 273, 67 N. Y. Supp. 809. ¹¹⁶*Duff v. Wardell*, 10 Abb. Pr. N. S. 84; Code Civ. Proc. § 3251, subd. 4.

full costs will be allowed on both appeals.¹¹⁷ In an old case, before the Code, only motion costs were allowed.¹¹⁸

h. Verdict directed, subject to the opinion of the appellate division.—Where a verdict is directed by the trial court, subject to the opinion of the appellate division, and a case is made and an argument had there, the party successful at the trial and in the appellate division is entitled to tax the same costs as upon an appeal from a judgment.¹¹⁹

392. Costs when a judgment is reversed.—The court has no discretion, in an action specified in § 3228 of the Code of Civil Procedure, as to costs, when it affirms or reverses a judgment. The order of affirmance or reversal must be with costs,¹²⁰ except where the plaintiff appeals from a judgment dismissing his complaint and there has been no appearance by the defendant on the trial or on the appeal, in which case the reversal or affirmance must be without costs, as there is no respondent.¹²¹

393. Allowance of separate bills of costs.—The appellate division will not award separate bills of costs to separate defendants, where from the nature of the case the affirmance or reversal of the judgment must be for all. The fact that the defendants had separate bills of costs below is a strong reason why they should have but one bill of costs on the appeal.¹²² The fact that but one notice of appeal was served and the same counsel argued the case for all is a good reason for allowing but one bill of costs upon the appeal.¹²³ But the appellate court has the power to grant separate bills of costs.¹²⁴ Where two or more defendants

¹¹⁷ Code Civ. Proc. §§ 1316, 3239, 3251, subdiv. 4; *Reichel v. New York C. & H. R. R. Co.* 18 N. Y. Civ. Proc. Rep. 248, 29 N. Y. S. R. 843, 9 N. Y. Supp. 414.

¹¹⁸ *Fellows v. Sheridan*, 6 How. Pr. 419.

¹¹⁹ Code Civ. Proc. § 3251, subdiv. 4.

¹²⁰ *Hahn v. Van Doren*, 1 E. D. Smith, 411; Code Civ. Proc. § 3238.

¹²¹ *Katz v. Diamond*, 16 Misc. 577, 74 N. Y. S. R. 174, 38 N. Y. Supp. 766.

¹²² *De Lamater v. Carman*, 2 Daly, 182.

¹²³ *Fischer v. Langbein*, 31 Hun. 272; *Ererson v. Gehrman*, 2 Abb. Pr. 413; *Sweet v. Mourry*, 49 N. Y. S. R. 262, 20 N. Y. Supp. 924.

¹²⁴ *De Lamater v. Carman*, 2 Daly, 182.

join in the same answer or demurrer, they are entitled to but one bill of costs, although upon the appeal they employ different attorneys.¹²⁵ But where they have answered or demurred separately, and unite upon the appeal, though they are usually allowed but one bill of costs upon the appeal, the court may allow separate bills of costs.¹²⁶ Where two or more defendants appear separately and a judgment in their favor is affirmed, "with costs to the respondents," only one bill of costs can be taxed.¹²⁷ But where it is affirmed, "with costs to the respondents who appeared on this appeal," separate bills of costs are awarded.¹²⁸

A defendant may be allowed costs upon an appeal where the judgment is reversed as to him, but affirmed as to his codefendant; but if he joins in an answer with his codefendant he cannot recover the costs of the trial. That fact would have precluded his having costs had he won on the trial. Such successful defendant cannot recover the printing disbursements where there was but one appeal book and one set of points, unless he can prove that he paid for them.¹²⁹

Separate bills of costs are properly allowed to the plaintiff, and to some of the defendants who are similarly situated, where the defendants are compelled to argue additional questions to those presented by the plaintiff.¹³⁰

394. When costs will be denied to the successful party.—Costs will not be allowed to a party who appeals unnecessarily, when he could have obtained the relief to which he was entitled by a motion in the trial court. A plaintiff will not be allowed

¹²⁵*Wilbur v. Wiltsey*, 13 How. Pr. 506.

¹²⁶*Von Keller v. Schulting*, 45 How. Pr. 139.

¹²⁷*Van Gelder v. Van Gelder*, 84 N. Y. 658; *Fischer v. Langbein*, 31 Hun, 272; *Re New York, W. S. & B. R. Co.* 28 Hun, 505.

¹²⁸*New York & N. H. R. Co. v. Schuyler*, 29 How. Pr. 89.

¹²⁹*Kane v. Metropolitan Elev. R. Co.* 15 Daly, 366. 28 N. Y. S. R. 399, 7 N. Y. Supp. 653. *Contra*, *Metropolitan Elev. R. Co. v. Duggin*, 33 N. Y. S. R. 992, 11 N. Y. Supp. 819. ¹³⁰*Knapp v. New York Elev. R. Co.* 4 Misc. 408, 53 N. Y. S. R. 571, 24 N. Y. Supp. 324.

the costs of an appeal from a judgment entered by the defendant upon the dismissal of the complaint, which the latter entered up as a dismissal "upon the merits." His remedy was to move to correct the judgment for irregularity.¹³¹ It is the usual practice in all appeals to deny the appellant costs when he succeeds upon a point not raised in the court below. A party who succeeds in having the amount of the verdict reduced upon an appeal, but who did not call the attention of the court below, upon his motion for a new trial, to the fact that the verdict was excessive, may not only not receive the costs, but they may be awarded to the respondent.¹³² Costs are sometimes not granted to the successful party, because the point involved is one of practice and is presented for the first time on appeal.¹³³

Costs will not be imposed upon a plaintiff where he is defeated by the repeal of the law under which he was proceeding, after the commencement of the action. A plaintiff, as trustee in bankruptcy, brought an action to set aside a transfer of property as having been made in violation of the bankruptcy law. Upon appeal his complaint was dismissed without costs, because the law under which he was acting had been repealed, but costs of the appeal were not awarded against him.¹³⁴

395. Costs upon appeals from orders. *a. Statute.*—"Upon an appeal from an interlocutory judgment or an order in an action, costs are in the discretion of the court, and may be awarded absolutely, or to abide the event, except as follows:

1. Where the appeal is taken from an order granting or refusing a new trial, and the decision upon the appeal refuses a new trial, the respondent is entitled, of course, to the costs of the appeal.

¹³¹*Johnson v. Lord*, 35 App. Div. 325, 54 N. Y. Supp. 922.

¹³³*Hesse v. Briggs*, 13 Jones & S. 417.

¹³²*Seidenbach v. Riley*, 6 N. Y. S.

¹³⁴*Olcott v. Maclean*, 11 Hun, 394, R. 104; *Wilson v. Lester*, 64 Barb. Appeal dismissed in 73 N. Y. 603. 434.

2. Where an appeal is taken from an order refusing a new trial, and an appeal is also taken from the judgment rendered upon the trial, neither party is entitled to the costs of the appeal from the order."¹³⁵

b. In general.—Costs are not in the discretion of the court where it affirms an order denying a motion for a new trial, made upon a case and exceptions. The respondent is entitled to costs absolutely, and as they are motion costs they can be collected under the provisions of § 779 of the Code of Civil Procedure. Section 1005 provides for a motion for a new trial after the entry of final judgment, and in such a case these costs could not be included therein.¹³⁶ The costs on an appeal from an order dismissing supplementary proceedings commenced by a county treasurer to collect a tax are regulated by § 3239 of the Code of Civil Procedure, and not by § 3240, providing for costs of an appeal in a special proceeding.¹³⁷ The costs of an appeal from a decision on a certiorari to review a tax or assessment under the Laws of 1880, chap. 269, are the same as costs on an appeal from an order.¹³⁸

396. Costs upon orders overruling or sustaining demurrers.—Upon an appeal from an order overruling or sustaining a demurrer, full costs are allowed, the order being substantially a judgment;¹³⁹ and where the order appealed from was made upon a motion for judgment on account of the frivolousness of the demurrer, costs of that motion are also allowable.¹⁴⁰ But where leave is granted to amend a defective pleading or to withdraw

¹³⁵ Code Civ. Proc. § 3239.

¹³⁶ *McIntyre v. German Sav. Bank*, 59 Hun, 536, 20 N. Y. Civ. Proc. Rep. 209, 37 N. Y. S. R. 545, 13 N. Y. Supp. 674.

¹³⁷ *Re Pryor*, 67 App. Div. 316, 73 N. Y. Supp. 961.

¹³⁸ *People ex rel. Bleecker Street & F. Ferry R. Co. v. Barker*, 90 Hun, 253, 35 N. Y. Supp. 803.

¹³⁹ *Van Gelder v. Van Gelder*, 13 Hun, 118; *Wright v. Flemming*, 18 Hun, 360; *Van Schaick v. Winne*, 8 How. Pr. 5; *Sutherland v. Tyler*, 11 How. Pr. 251.

¹⁴⁰ *Whitman v. Nicol*, 49 How. Pr. 88, 16 Abb. Pr. N. S. 329.

a demurrer, it becomes an interlocutory order till the leave expires, and upon the decision of an appeal from such an order only \$10 costs are allowable. The same costs are allowable upon an appeal from an order sustaining or overruling a demurrer to a part of the pleading.¹⁴¹

397. Costs upon the dismissal of an appeal.—A respondent is entitled to only \$10 motion costs when he moves to dismiss an appeal on account of the failure to make and serve a case, which motion is granted, unless the appellant make and serve a case. The appellant may abandon the case, and the respondent cannot tax full costs by placing the case on the calendar and having it dismissed¹⁴²

The decision of the appellate division dismissing an appeal is an order upon a motion, and that court can grant motion costs. There is no authority for taxing an argument fee.¹⁴³

398. Costs upon appeals from order of county court granting a new trial.— Full costs are awarded upon the reversal of an order of the county court granting a motion for a new trial made upon the judge's minutes. The first clause of subd. 4 of § 3251 of the Code of Civil Procedure applies.¹⁴⁴ The order of the appellate division ordering judgment absolute and reversing the county court and the justices' court must order a restitution of all that the appellant has lost, and that means the costs in the justice's court and in the county court.¹⁴⁵

399. Costs upon appeals in bastardy proceedings.— Under §§ 850–873 of the Code of Criminal Procedure, costs must be allowed to the successful party upon an appeal in bastardy proceedings. The costs are analogous to the costs upon an appeal from a justice's judgment, and those costs should govern.¹⁴⁶

¹⁴¹*Hoffman v. Barry*, 2 Hun, 52, 4 Thomp. & C. 253.

¹⁴²*Estus v. Baldwin*, 9 How. Pr. 80.

¹⁴³*Mayham v. Allen*, 50 Hun, 343,

¹⁴⁴*Mahon v. Mahon*, 64 App. Div. 19 N. Y. S. R. 811, 3 N. Y. Supp. 262, 72 N. Y. Supp. 102. *Contra*, 100; *Neary v. Robinson*, 98 N. Y. Sprague v. Richards, 30 Hun, 246. 81; *Superintendents of Poor v.*

¹⁴⁵*Dunseith v. Stark*, 3 Month. L. Moore, 12 Wend. 273; *Rivenburgh v. Bull.* 42. *Henness*, 4 Lans. 208.

¹⁴⁶*Cusick v. Adams*, 47 Hun, 455.

CHAPTER XXXI.

ITEMS.

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400. Disbursements; in general.—The statute governing disbursements generally is found in § 3256 of the Code of Civil Procedure.

The necessary disbursements and fees of officers allowed by law cannot be recovered by the prevailing party, where he is not allowed to recover costs.¹ They cannot be allowed till final judg-

¹*Belding v. Conklin*, 4 How. Pr. *Taylor v. Gardner*, 4 How. Pr. 67, 196, 2 N. Y. Code Rep. 112; 2 N. Y. Code Rep. 47. *Contra, New-Wheeler v. Westgate*, 4 How. Pr. *ton v. Sweet*, 4 How. Pr. 134, 2 N. Y. 269; *Rust v. Hauselt*, 8 Abb. N. C. Code Rep. 61.
149; *Pett v. Warth*, 1 Bosw. 653;

ment,² and must be specified in the bill of costs. It is not sufficient that they be specified in the affidavit which the party reads upon the taxation, and which the opposite party has not seen till that time.³ Where the amount of costs is limited, the costs and disbursements cannot exceed that sum.⁴ The amount paid by the plaintiff in replevin to a surety company for a bond is not a taxable disbursement. The defendant need not file an affidavit opposing the taxation of such an item, as the plaintiff's papers show that the item is not taxable.⁵ The legal fee for serving a summons is \$1, and 6 cents per mile going and returning.⁶ The plaintiff cannot charge for serving defendants, and \$2 for extra defendants, unless they are necessary parties. A defendant need not take this objection by answer or demurrer, but may raise the question upon the taxation of costs.⁷ In a mortgage foreclosure action, each of three judgment creditors must be served where there is nothing upon the record to show that they are partners. The plaintiff is justified in serving one by publication, when he could not serve him personally.⁸

401. Disbursements for abstracts of title.—Money paid for an abstract made by a county clerk or by a title insurance, abstract, or searching company doing business under the laws of the state, where the office of the county clerk is a salaried one, is a taxable disbursement.⁹ Amounts paid for other unofficial abstracts are not taxable. Until the amendment to the Code of Civil Procedure in 1895, money paid for unofficial abstracts was not a taxable disbursement.¹⁰ Surveyor's fees, as regulated by § 3299 of

²*Weeks v. Cornwell*, 38 Hun. 577.

³*Shannon v. Brower*, 2 Abb. Pr. Ct. Rep. 404; Code Civ. Proc. § 3307. 377.

⁴*Warren v. Chase*, 8 Misc. 520. 59 N. Y. S. R. 416, 23 N. Y. Supp. 765; *Keating v. Anthony*, N. Y. Code Rep. N. S. 233.

⁵*Bick v. Reese*, 52 Hun. 125, 17 N. Y. Civ. Proc. Rep. 110, 23 N. Y. S. R. 404, 5 N. Y. Supp. 121.

⁶*Brown v. Mapleson*, 2 N. Y. City

⁷*Case v. Price*, 9 Abb. Pr. 111, 17 How. Pr. 348.

⁸*Chevers v. Damon*, 37 N. Y. S. R.

⁹Code Civ. Proc. § 3256.

¹⁰*Equitable Life Assur. Soc. v. Olyphant*, 57 Hun. 414, 19 N. Y. Civ. Proc. Rep. 20, 32 N. Y. S. R. 704,

the Code of Civil Procedure, are a taxable disbursement only when a survey is a part of the proceedings, as in admeasurement of dower.¹¹ The fees of a county treasurer for receiving money are not taxable disbursements; they must be deducted from the fund.¹²

402. Disbursements for fees of clerk.— The fees of the clerk of the court are regulated by §§ 3301 and 3302 of the Code of Civil Procedure. Where the clerk is also the county clerk, he is entitled in addition thereto to the fees prescribed in § 3304 of the Code of Civil Procedure.

Sec. 3301 is as follows: "Except as otherwise prescribed in the next section, each clerk of a court of record is entitled for his services in an action or a special proceeding brought in or transferred to the court of which he is clerk, to the following fees: Upon the trial of the action, or the hearing upon the merits of the special proceeding, from the party bringing it on, \$1.

"For entering final judgment in the action, or entering a final order in the special proceeding, including the filing of the judgment roll, and a copy of the judgment to insert therein, 50 cents; and 10 cents in addition for each folio, exceeding ten, contained in the order or judgment.

"For entering any other order or an interlocutory judgment, 10 cents for each folio, exceeding five.

"For a certified or other copy of an order, record, or other paper, entered or filed in his office, 5 cents for each folio.

"Where, on an appeal from a judgment or order, a party shall present to the clerk a printed copy of the judgment roll or order appealed from, it shall be the duty of the clerk, as required, to compare and certify the same, for which service he shall be entitled to be paid at the rate of 1 cent per folio.

10 N. Y. Supp. 659; *Equitable Life* 11 Code Civ. Proc. § 3299; *Haynes Assur. Soc. v. Hughes*, 125 N. Y. 106. v. *Mosher*, 15 How. Pr. 216.

19 N. Y. Civ. Proc. Rep. 326, 11 L. 12 *Veeder v. Mudgett*, 27 Hun, 519, R. A. 280, 34 N. Y. S. R. 591, 26 Modified in 95 N. Y. 295.

N. E. 1.

"For a certified transcript of the docket of a judgment, 12 cents.

"For filing a transcript and docketing or redocketing a judgment thereupon, 6 cents.

"He is not entitled to any fee or other compensation for any other service, in an action or a special proceeding in the court, except that where he is also county clerk, he may charge fees as prescribed in § 3304 of this act, subject to the limitations therein contained.

"Where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fee therefor.

"And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts, and shall be used or filed with the same force and effect as if certified by a clerk of the court."

Sec. 3302 is as follows: "The last section does not apply to the clerk of a surrogate's court, of the city court of the city of New York, of the city court of Yonkers, of the justices' court of the city of Albany, or of a mayor's or recorder's court."

The clerk or any other officer authorized to administer an oath, except where another fee is specially prescribed by statute, is entitled to the sum of 12 cents, for administering an oath or affirmation and certifying the same. Code Civ. Proc. § 3298.

The fees of the clerk of the court of appeals are prescribed by § 3300 of the Code of Civil Procedure, which is as follows:

"The clerk of the court of appeals is entitled, for the services specified in this section, to the following fees:

"For filing a notice of appeal to that court, and all the papers transmitted therewith, 50 cents.

"For filing any other paper, 10 cents.

"For drawing an order, 20 cents for each folio.

"For entering an order, 20 cents; and for each folio more than two, 10 cents.

"For drawing a judgment, 25 cents; and for each folio more than two, 10 cents.

"For entering a judgment, 25 cents; and for each folio more than two, 10 cents.

"For a certified copy of an order, record, or other paper entered or filed in his office, 10 cents for each folio.

"For engrossing a remittitur, 10 cents for each folio.

"For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, 25 cents.

"For sealing any paper, when required, 50 cents."

A clerk may demand his pay for any service before he performs it. If he does not, he gives credit to the party at whose request the service was performed. The clerk is bound to perform each service required of him on being paid his fee therefor. He cannot insist that, before performing some service, he shall first be paid his fees for some previous service rendered to the same party for which he has given credit.¹³ Under the old Code he was entitled to \$1 on trial fee, where the case was tried by a referee.¹⁴

403. Disbursements in obtaining witnesses. a. Expense of serving subpœna.—The expense of serving subpœnas could not be allowed under the Revised Statute or the Code of Procedure.¹⁵

¹³*Purdy v. Peters*, 23 How. Pr. 328, ¹⁵*Case v. Price*, 9 Abb. Pr. 111, 17
15 Abb. Pr. 160. How. Pr. 348; *Rogers v. Rogers*, 2

¹⁴*Benton v. Sheldon*, 1 N. Y. Code Paige, 460, 464.
Rep. 134.

There is a uniform current of opinion recognizing such charges as improper.¹⁶

Code Civ. Proc. § 3307, subd. 1, exempts the service of a subpœna from the list of mandates for serving which the sheriff is entitled to \$1. A charge for such a disbursement has no authority. The requisites, of an affidavit upon the taxation of witness fees are contained in § 3267 of the Code of Civil Procedure.

b. Not necessary that witness be subpœnaed.—A party can tax fees for a witness who has attended the trial at his request. It is not absolutely necessary that the witness be subpœnaed in order to tax his fees. It is sufficient if he attend the trial at the request of the party.¹⁷ The party at whose request he attended is liable for his fees, but the payment of fees by a party after a case is disposed of in his favor, when he is not legally liable for them, does not entitle him to have such fees allowed.¹⁸

c. Fees of parties.—A party is not entitled to tax witness fees for his own attendance.¹⁹ If he desires to have the testimony of his adversary, he must subpœna him as he would any other witness, thus creating a duty on his part to attend and be sworn as a witness.²⁰ If his adversary is present in court, he can compel him to be a witness by subpœnaing him and paying him his fees therefor. The affidavit need not show in the first instance that the witness was material, and need not be made by the party or his attorney, but may be made by a third party.²¹

d. Fees of stockholders and officers of a corporation and of attorneys.—It is no objection to the taxation of the fees of a witness that he is a stockholder of the corporation that is seeking

¹⁶*Burnett v. Westfall*, 15 How. Pr. 430; *Wheeler v. Lozee*, 12 How. Pr. 446; *Pierrepont v. Lovclass*, 4 Hun, 681.

¹⁷*Wheeler v. Ruckman*, 5 Robt. 702; *Wheeler v. Lozee*, 12 How. Pr. 446; *Vence v. Speir*, 18 How. Pr. 168.

¹⁸*Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

¹⁹Code Civ. Proc. § 3288.

²⁰*Hewlett v. Brown*, 1 Bosw. 655,

Abb. Pr. 74.

²¹*Willink v. Reckle*, 19 Wend. 82.

to tax that disbursement.²² An attorney in an action or special proceeding is not entitled to witness fees.²³ Fees for officers of a corporation which is a party cannot be taxed unless the affidavit distinctly shows not only that they attended as witnesses, but also that their fees have been or will be paid.²⁴

e. Fees of witnesses not sworn.—It is presumptive evidence that a witness is not necessary, when he is not sworn. That presumption must be overcome before his fees can be taxed.²⁵ If the witnesses are not paid in advance or daily, that is a strong circumstance against the allowance of their fees.²⁶ Fees for witnesses to impeach a supposed adverse witness cannot be taxed without showing sufficient grounds for believing that such witness would attend court and be sworn; and where he did not attend, and was not sworn, it must further appear that such witnesses would have impeached him had he been sworn.²⁷

A defendant who had been sued on three notes, and had interposed the defense of forgery in each case, was held justified in subpoenaing seventeen witnesses on that point in the second case tried, where he had called twelve on the first case and had been defeated, although the court on the second trial limited him to five.²⁸ The court has power to limit the number of witnesses upon any one point, and where thirty-three witnesses are subpoenaed to impeach the plaintiff, the court has a right to restrict the number for which fees may be allowed to the number which he would allow to testify. In one case it was five.²⁹ The plaintiff was allowed to tax the fees of ten witnesses, where he

²²*Medbury v. Butternuts & S.* 376; *Mead v. Mallory*, 27 How. Pr. 376; *Turnp. Co.* 1 How. Pr. 231.

²³Code Civ. Proc. § 3288.

²⁴*Agricultural Ins. Co. v. Bean*, 45

²⁵*Cheever v. Pittsburgh, S. & L. E.* How. Pr. 444.

R. Co. 74 Hun. 539, 57 N. Y. S. R. 188, 26 N. Y. Supp. 829.

²⁷*Agricultural Ins. Co. v. Bean*, 45

²⁸*Haynes v. Mosher*, 15 How. Pr. 216; *Kohn v. Manhattan R. Co.* 8

²⁹*Lowrerre v. Vail*, 5 Abb. Pr. 227; *Irwin v. Deyo*, 2 Wend. 285.

Misc. 421, 59 N. Y. S. R. 34, 28 N. Y. Supp. 663; *Dean v. Williams*, 6 Hill, 174, 2 N. Y. Supp. 231.

²⁶*Kley v. Healey*, 18 N. Y. S. R.

had subpœnaed forty to support his general character in an action for slander, and swore only two.³⁰

The clerk should adjourn the taxation to give a party an opportunity to procure affidavits showing that certain persons whose expenses were sought to be taxed were not material or necessary, or had not been subpœnaed or paid their fees.³¹ The taxing party should show what was expected to be proved by each witness, and why he was not called.³²

f. Traveling fees. (1) *Where witness resides out of the state.*—A witness who lives out of the state will be allowed traveling fees from the state line, by the nearest usually traveled route.³³ But if subpœnaed at the place of trial, he is not entitled to traveling fees, and they cannot be taxed, if paid.³⁴

(2) *Where witness resides in the state.*—A witness residing in the state is only entitled to traveling fees from his residence to the place of trial, unless it appears that he went to the place of trial solely for the purpose of attending the same, and that he returned to the place where he was subpœnaed after the trial.³⁵ Fees in such cases are allowed, unless it appears that the party was negligent in not subpœnaing him before he left home. The necessity of showing the negligence, or want of it, has been held to be upon the taxing party.³⁶ A witness is entitled to his trav-

³⁰*Irwin v. Deyo*, 2 Wend. 285. Abb. Pr. 152; *Wheeler v. Lozee*, 12

³¹*Agricultural Ins. Co. v. Bean*, 45 How. Pr. 446.
How. Pr. 444.

³⁴*Dowling v. Bush*, 6 How. Pr. 410;

³²*Kohn v. Manhattan R. Co.* 8 Misc. Bank of Niagara v. Austin, 6 Wend. 421, 59 N. Y. S. R. 34, 28 N. Y. 548.

Supp. 663; *Haynes v. Mosher*, 15 ³⁵*Pfandler Barm Extracting Bung-*
How. Pr. 216; *Mark v. Buffalo*, 87 *ing Apparatus Co. v. Pfandler*, 39
N. Y. 189; *Robitzek v. Heet*, 3 N. Y. Hun, 191, 3 How. Pr. N. S. 253; *Sar-*
Civ. Proc. Rep. 156; *Agricultural gent v. Warren*, 41 Hun, 103, 11 N.
Ins. Co. v. Bean, 45 How. Pr. 444. Y. Civ. Proc. Rep. 160; *Mitchell v.*

³³*Hicks v. Brennan*, 10 Abb. Pr. *Westerreilt*, 6 How. Pr. 265.

304; *Moulton v. Townsend*, 16 How. ³⁶*Sargent v. Warren*, 41 Hun, 103,
Pr. 306; *Howland v. Lenox*, 4 Johns. 11 N. Y. Civ. Proc. Rep. 160; *Mead*
311; *Clarks v. Staring*, 4 How. Pr. v. *Mallory*, 27 How. Pr. 32. *Contra*,
243; *Hinds v. Schenectady County Pfandler Barm Extracting Bunging*
Mut. Ins. Co. 7 How. Pr. 142; *Taaks Apparatus Co. v. Pfandler*, 39 Hun,
v. *Schmidt*, 25 How. Pr. 340; *Dun-* 191, 3 How. Pr. N. S. 253.
ham v. Sherman, 19 How. Pr. 572, 11

eling fees, going and returning, every time he is compelled to return home on account of the adjournment of the court, or the setting of a case down for a future day;³⁷ but not for returning home over Sunday.³⁸ Traveling fees will not be allowed simply because the witness lives at a distance from the place of the trial. It must be shown that the witness traveled the number of miles charged, for the sole purpose of attending the trial,³⁹ and that by the usually traveled route.⁴⁰

Where witnesses have been subpoenaed for a term of court, and they are prevented from coming because of a telegram stating that the court would not be held, their fees can be taxed in the judgment.⁴¹ When a case is put over the term upon the condition that the expenses of the term be paid, the fees paid witnesses for mileage and attendance must be paid.⁴²

g. Fees when witness did not attend the trial.—A party can recover back the fees that he has paid a witness who did not attend the trial. Therefore, the fees of a witness are not taxable, where he did not attend the trial,⁴³ or where he did not arrive till after the trial.⁴⁴ But a plaintiff was allowed to tax the fees of witnesses who left home in time to attend the opening of the term of court, but, on account of an accident, did not arrive till the opening of the second day, where no case had been tried and the case for which they were subpoenaed had been put over the term upon the motion of the defendant at the opening of the court on the first day.⁴⁵

A party has three remedies against a witness who does not attend the court after being legally subpoenaed:

³⁷*Moulton v. Townsend*, 16 How. Pr. 306; *Miller v. Huntington*, 1 How. Pr. 218.

³⁸*Muscott v. Runge*, 27 How. Pr. 85; *Hoffman v. New York, L. E. & W. R. Co.* 18 Jones & S. 512.

³⁹*Wheeler v. Ruckman*, 5 Robt. 702.

⁴⁰*Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

⁴¹*Roth v. Meads*, 20 How. Pr. 287.

⁴²*Ford v. Monroe*, 6 How. Pr. 204, 10 N. Y. Legal Obs. 155.

⁴³*Ehle v. Bingham*, 4 Hill, 595.

⁴⁴*Booth v. Smith*, 5 Wend. 107.

⁴⁵*Anonymous*, 3 Hill, 457.

1. An action at common law for damages.

2. By attachment proceedings.

3. By bringing an action against him for the statutory penalty. If he brings an action against a witness he must prove that the defendant was a material witness and that he suffered damages by such nonattendance. The omission to pay the witness his fees, day by day, is a reasonable excuse for nonattendance, as the witness is not obliged to trust the party for his legal fees.⁴⁶

h. Terms for which fees of witnesses may be taxed.—Witness fees can be charged only for the terms of court when the taxing party was ready to try the case.⁴⁷ He is not justified in subpoenaing witnesses for a term of court at which it was certain that the case would not be tried, but would be sent to a referee.⁴⁸ A party who has a default opened, upon paying to the opposite party the costs of that term, has, upon ultimately succeeding in the action the right to tax his disbursements for witnesses for the term at which the default was taken.⁴⁹

i. Days for which fees of witnesses may be taxed.—Generally a party can tax witness fees only for the days that the case was on the day calendar and the witnesses were in attendance.⁵⁰ The fact that the trial closes so late that a witness cannot reach home that night, but is compelled to remain till the next day, does not entitle him to fees for the day that he is compelled to remain at the place of trial.⁵¹ But if it can be shown that it was necessary to subpoena witnesses earlier, in order to insure their attendance when wanted, the fees for the time that the witnesses were under subpoena can be taxed.⁵² A witness will be granted an allowance

⁴⁶*Courtney v. Baker*, 3 Denio, 27.

⁴⁷*Kohn v. Manhattan R. Co.* 8 Misc. 421, 59 N. Y. S. R. 34, 28 N. Y. Supp. 663; *Delcomyn v. Chamberlain*, 48 How. Pr. 411.

⁴⁸*Pike v. Nash*, 16 How. Pr. 53.

⁴⁹*Hudson v. Erie R. Co.* 57 App. Div. 98, 68 N. Y. Supp. 28.

⁵⁰*Vence v. Speir*, 18 How. Pr. 168; *Allen v. Mahon*, 1 Abb. N. C. 468.

⁵¹*Evans v. Ferguson*, 10 N. Y. Civ. Proc. Rep. 57.

⁵²*Wheeler v. Ruckman*, 5 Robt. 702; *Curtis v. Dutton*, 4 Sandf. 719; *Crummer v. Huff*, 1 Wend. 24; *Allen v. Mahon*, 1 Abb. N. C. 468; *Ehle v. Bingham*, 4 Hill, 595.

for the time that the court is in session, when the distance from his home to the court is so great that it is impracticable for him to go home and return upon the day for which the case is set down for trial.⁵³ A witness is entitled to fees for Saturday and Sunday.⁵⁴ If the witness lives where the trial is held and attends at the courthouse only on the day of trial, fees for only one day can be taxed.⁵⁵ If the court has a day calendar and the witness actually attends court each day that the case is on the day calendar, he is entitled to fees for those days.⁵⁶ If the witness resides without the state the time of his attendance can be computed only from the time that he crosses the boundary line of the state, until he reaches the same place upon his return.⁵⁷

j. When a witness is entitled to fees in two cases.—A witness is entitled to full fees in each of two cases if he is in attendance at the court, although the parties to both actions are the same.⁵⁸ But where both actions are tried together, he is entitled to but one fee.⁵⁹

k. Departure of witnesses before the trial.—A party who allows his witnesses to go before trial is no more entitled to tax fees for their traveling and attendance than he would be for witnesses who came after the trial was over. In neither case can they be taxed.⁶⁰ A defendant attended court with his witnesses, and then left with them when he thought that his case could not be reached that term. The case was reached and the plaintiff took a default, which was afterwards opened, and the defendant

⁵³*Moulton v. Townsend*, 16 How. 304; *Vence v. Speir*, 18 How. Pr. 306.

⁵⁴*Moulton v. Townsend*, 16 How. Pr. 306; *Wheeler v. Ruckman*, 5 V. Supp. 712; *Willink v. Reekle*, 19 Robt. 702; *Muscott v. Runge*, 27 Wend. 82; *Taaks v. Schmidt*, 25 How. Pr. 85.

⁵⁵*Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

⁵⁶*Mead v. Mallory*, 27 How. Pr. 32; *Allen v. Mahon*, 1 Abb. N. C. 468.

⁵⁷*Howland v. Lenoir*, 4 Johns. 311. ⁵⁸*Hicks v. Brennan*, 10 Abb. Pr. costs 31.

⁵⁹*Sanders v. Failing*, 3 Thomp. & C. 64. *Contra*, *Wilder v. Wheeler*, 1

How. Pr. 136.

⁶⁰*Bowling v. Bush*, 6 How. Pr. 410; *Booth v. Smith*, 5 Wend. 107.

won, but he was not allowed to tax the witnesses' fees for the term that the default was taken.⁶¹ If a witness departs before the trial, his fees may be recovered from him.⁶² Where the adversary charges in an affidavit, upon information and belief, that some of the witnesses charged for in the bill of costs had departed for home before the trial, an ordinary affidavit will not be sufficient to sustain those charges.⁶³

l. Expert witnesses.—The fees of experts, beyond the fees fixed by statute for witnesses, are not taxable disbursements.⁶⁴

Section 308 of the Code of Criminal Procedure does not cover the fees of expert witnesses called on the part of the prisoner, under the head of incidental expenses, or personal expenses.⁶⁵ Fees of expert witness cannot be taxed in the district courts of New York. Fees of witnesses in that court are fixed by § 1370 of the consolidation act.⁶⁶

404. Jurors' fees.—The plaintiff cannot tax jurors' fees where the defendant suffers default upon the calling of the case at the trial term, because the defendant thereby waives a jury trial.⁶⁷

The successful party can charge the amount paid to each jury, where there has been more than one trial, even if the jury disagrees, or its verdict is set aside for their misconduct.⁶⁸

405. Proving genuineness of paper.—The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party a paper, material to the action, and request a written admission of its genuineness. If the admission is not given within four days after the request, and the paper is proved or

⁶¹*Purdy v. Morgan*, 2 How. Pr. 149.

⁶²*Ehle v. Bingham*, 4 Hill, 595.

⁶³*Dowling v. Bush*, 6 How. Pr. 410;
Dean v. Williams, 6 Hill, 376.

⁶⁴*Mark v. Buffalo*, 87 N. Y. 184, 13 N. Y. Week. Dig. 415; *Randall v. Morning Journal Asso.* 22 Misc. 715, 49 N. Y. Supp. 1064; *Re Grade Crossing Comrs.* 19 Misc. 230, 43 N. Y. Supp. 1073; *Rogers v. Rogers*, 2 Paige, 458.

⁶⁵*People ex rel. Cantwell v. Coler*, 61 App. Div. 598, 70 N. Y. Supp. 755.

⁶⁶*Randall v. Morning Journal Asso.* 22 Misc. 715, 49 N. Y. Supp. 1064.

⁶⁷*Goodyear v. Baird*, 11 How. Pr. 377.

⁶⁸*Hudson v. Erie R. Co.* 57 App. Div. 98, 78 N. Y. Supp. 28.

admitted on the trial, the expense incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial, and paid by the party refusing the admission, unless it appears, to the satisfaction of the court, that there was a good reason for the refusal.⁶⁹

406. Trial fee. *a. In general.*—A trial fee cannot be taxed unless there is a trial, which means a judicial examination of the issues raised, either by the pleadings or by the evidence. Therefore, if the plaintiff moves to discontinue when the case is reached on the call of the calendar, which motion is granted, with costs, the defendant cannot tax a trial fee.⁷⁰ A trial fee has been allowed when the case was discontinued, when it was on the day calendar, although not actually reached.⁷¹ But if the complaint is dismissed upon the default of the plaintiff and the motion of the defendant, a trial fee is taxable.⁷² When a plaintiff accepts an offer of settlement, made by the defendant after the case is on the day calendar, he cannot tax a trial fee.⁷³ He is entitled to a trial fee where the defendant insists upon his defense till the plaintiff moves the case for trial.⁷⁴ But where a defendant, two days before the case was on the day calendar, would not accept the plaintiff's offer to discontinue upon the payment of costs, because he wished to move for an additional allowance, he cannot, after the decision of that motion, tax up a trial fee, although the case had, in the meantime, appeared on the day calendar.⁷⁵

A defendant is entitled to a trial fee when the case is dismissed at the trial before any evidence is taken.⁷⁶ Where a mo-

⁶⁹ Code Civ. Proc. § 735.

⁷⁰ *Studicell v. Baxter*, 33 Hun, 331; 23 N. Y. Civ. Proc. Rep. 113, 23 N. Y. Supp. 674.

Sutphen v. Lash, 10 Hun, 120. ⁷¹ *Kronsberg v. Mayer*, 20 N. Y.

Contra, Ehlers v. Willis, 63 How. Pr. 341; *Jones v. Case*, 38 How. Pr. 349. Civ. Proc. Rep. 80, 15 N. Y. Supp. 328.

⁷² *Duperey v. Phoenix*, 1 Abb. N. C. 133 note. ⁷³ *Jones v. Case*, 38 How. Pr. 349.

⁷⁴ *McComb v. Kellogg*, 13 N. Y. Civ. Proc. Rep. 150.

⁷⁵ *Dodd v. Curry*, 4 How. Pr. 123, 2 N. Y. Code Rep. 69; *Cole v. Lowry*, ⁷⁶ *Dodd v. Curry*, 4 How. Pr. 123,

tion is made in the special term when the case is called for trial, for the dismissal of the complaint on the ground that the facts stated therein do not entitle the plaintiff to relief in equity, and the case is sent to the trial term and there disposed of, the proceedings in the special term do not constitute a trial, and the successful party can not tax a fee therefor.⁷⁷ But if the court at trial term finally disposes of the issues upon a motion to dismiss the complaint because it did not state a cause of action, a trial fee is taxable.⁷⁸ No issue is raised by the pleadings, where no answer or demurrer is served, or when the answer does not deny the indebtedness set forth in the complaint, but sets up a counterclaim, to which no reply is served. In such cases the plaintiff is not entitled to tax the costs for proceedings subsequent to the notice of trial, nor for a trial fee.⁷⁹ There is no trial when the court, of its own motion, sends the case to a referee, after one witness is sworn.⁸⁰

b. More than one trial.—A trial fee is chargeable for every time the case is tried, whether there is a verdict or not. The labor is just as great where the jury disagree as where they agree.⁸¹ The successful party may also, in the first department, tax for each trial the amount allowed when a case takes more than two days; also the charge for all proceedings after notice and before trial,⁸² and the term fees for the term, if it is on the

2 N. Y. Code Rep. 69; *Shannon v. Brower*, 2 Abb. Pr. 377.

⁷⁷*Evans v. Ferguson*, 10 N. Y. Civ. Proc. Rep. 57.

⁷⁸*Shannon v. Brower*, 2 Abb. Pr. 377; *Mora v. Great Western Ins. Co.* 10 Bosw. 622.

⁷⁹*Pardee v. Schenck*, 11 How. Pr. 500; *Cohen v. Cohen*, 72 Hun, 393, 55 N. Y. S. R. 463, 25 N. Y. Supp. 387.

⁸⁰*Third Nat. Bank v. McKinstry*, 2 Hun, 443, 5 Thomp. & C. 52.

⁸¹*Hamilton v. Butler*, 30 How. Pr. 36, 19 Abb. Pr. 446, 4 Robt. 654; *Spring v. Day*, 44 How. Pr. 390; *Hudson v. Erie R. Co.* 57 App. Div. 98, 68

N. Y. Supp. 28; *Friedheim v. Metropolitan Street R. Co.* 35 Misc. 199,

71 N. Y. Supp. 485; *Lafond v. Jatzkowitz*, 17 Abb. N. C. 87; *Faber v. Van Tassell*, 4 Month. L. Rep. 30.

⁸²*Gilroy v. Badger*, 28 Misc. 143, 58 N. Y. Supp. 1106; *Friedheim v.*

Metropolitan Street R. Co. 35 Misc. 199, 71 N. Y. Supp. 485; *Zelmanovitz v. Manhattan R. Co.* 24 N. Y. Civ. Proc. Rep. 402, 67 N. Y. S. R.

405, 33 N. Y. Supp. 583; *Spring v. Day*, 44 How. Pr. 390; *Kummer v.*

Christopher Street R. Co. 12 Misc. 387, 24 N. Y. Civ. Proc. Rep. 404, 67 N. Y. S. R. 404, 33 N. Y. Supp. 581

calendar.⁸³ But the item for all proceedings after notice and before trial is not allowed in the second department where the calendar practice requires but one notice of trial.⁸⁴ Where there are issues of fact as well as of law, and the court has passed on the issue of law, and sent the facts to a referee, two trial fees may be charged.⁸⁵

Two trial fees may also be taxed where a referee dies before the case is finished, and a new trial is necessary.⁸⁶ A party is entitled to tax the costs of a trial, where it was commenced before a judge who was disqualified to hear the case, and also another trial fee when the case was disposed of.⁸⁷ Where the plaintiff puts the case on the short cause calendar and it is not tried in an hour, and is sent to the general calendar, the defendant is entitled to two trial fees and two items of costs after notice of trial.⁸⁸

c. Only one trial fee taxable.—But one trial fee can be taxed where the plaintiff was nonsuited at the trial, and the appellate division reversed the trial term, but the court of appeals rendered judgment absolute, and the amount of the recovery was determined by an assessment of damages at the trial term. The plaintiff, however, can recover his disbursements upon the assessment of damages, under §§ 3228 and 3256 of the Code of Civil Procedure.⁸⁹ But one trial fee can be taxed when, at the

⁸³*Spring v. Day*, 44 How. Pr. 390.

⁸⁵*Wiggins v. Arkenburgh*, 4 Sandf.

⁸⁴*Seifter v. Brooklyn Heights R. Co.* 53 App. Div. 443, 65 N. Y. Supp. 1123; *Hudson v. Erie R. Co.* 57 App. Div. 98, 68 N. Y. Supp. 28; *Bank of Mobile v. Phoenix Ins. Co.* 8 N. Y. Civ. Proc. Rep. 212; *Arent v. Eisenmann*, decided by the same court as *Spring v. Day*, is said to have overruled the latter case in 9 Abbott's Digest (Rev. ed. 2d. Supp.) Title "Costs" par. 359; *Hudson v. Erie R. Co.* 57 App. Div. 98, 68 N. Y. Supp. 28; *Hakonson v. Metropolitan Street R. Co.* 40 Misc. 182, 81 N. Y. Supp. 662.

688; *Evans v. Ferguson*, 10 N. Y. Civ. Proc. Rep. 57.

⁸⁶*Kley v. Healey*, 18 N. Y. S. R. 174, 2 N. Y. Supp. 23.

⁸⁷*Cregin v. Brooklyn Cross Town R. Co.* 19 Hun. 349.

⁸⁸*Gilroy v. Badger*, 28 Misc. 143, 58 N. Y. Supp. 1106; *Barry v. Winkle*, 36 Misc. 171, 73 N. Y. Supp. 188.

⁸⁹*Young v. Syracuse, B. & N. Y. R. Co.* 35 Misc. 114, 71 N. Y. Supp. 221.

trial, before the impaneling of a jury, the plaintiff made a motion for judgment on the pleadings, and after argument, briefs were submitted, and later the court handed down a decision denying the motion and ordering the case on the calendar, and the case was tried. What took place the first time was simply a preliminary motion.⁹⁰

d. Withdrawal of a juror.—Where a trial has duly commenced and the court allows its discontinuance upon the withdrawal of a juror, the party finally successful can tax a trial fee for such procedure.⁹¹ But where a juror is withdrawn after the plaintiff has moved for judgment upon the pleadings, upon the condition of the defendant paying \$30 costs, or all costs to date, the plaintiff, upon succeeding upon a new trial, cannot tax two trial fees.⁹²

e. Inquest or default.—An inquest is such a trial that it entitles the plaintiff to a trial fee.⁹³ The defendant⁹⁴ or the plaintiff⁹⁵ who takes a judgment by default, which is opened without terms, is entitled to a trial fee therefor, if he succeeds upon the new trial. In such a case he may tax two trial fees, unless the court in its order expressly limits the amount of costs to be taxed for the favor of opening the default.⁹⁶

If two inquests have been opened and upon a trial the plain-

⁹⁰*Pach v. Gilbert*, 29 N. Y. S. R. Supp. 1086; *Candee v. Jones*, 13 N. 833, 9 N. Y. Supp. 546. Y. Civ. Proc. Rep. 160; *Wessels v.*

⁹¹*Mott v. Consumers Ice Co.* 8 Carr, 22 Abb. N. C. 464, 6 N. Y. Daly, 244; *Deucey v. Stewart*, 6 How. Supp. 535.

⁹²*Starr Cash Car Co. v. Reinhardt*, 23 N. Y. Civ. Proc. Rep. 113, 23 N. Y. Supp. 674.

⁹³*Lennon v. MacIntosh*, 19 Abb. N. C. 175.

⁹⁴*Candee v. Jones*, 13 N. Y. Civ. Proc. Rep. 160; *Baker v. McMullen*.

⁹⁵*Weiss v. Morrell*, 7 Misc. 541, 58 N. Y. S. R. 319, 28 N. Y. Supp. 61; *Jacob Hoffman Brewing Co. v. Volpe*, 4 Misc. 261, 23 N. Y. Supp. 812; *Hawley v. Davis*, 5 Hum. 642; *Pomeroy v. Hulin*, 7 How. Pr. 161; *Herman v. Lyons*, 10 Hum. 111; *Baker v. McMullen*, 28 Misc. 128, 58 N. Y. Supp. 1086; *Cole v. Lowry*, 23 N. Y. Civ. Proc. Rep. 113, 23 N. Y. Supp. 674.

tiff recovers a judgment, he is entitled to tax three trial fees.⁹⁷ Whether the successful party may tax the costs that were paid by the defeated party to open the inquest or default depends upon the construction that the different courts place upon their own order.⁹⁸

No trial fee is allowable in a divorce action where there is no demurrer or answer, and the plaintiff obtains a decree upon application to the court after proving his case.⁹⁹

f. New trial had pursuant to an order.—The provisions of subd. 3 of § 3251 of the Code of Civil Procedure, allowing \$25 to be taxed for proceedings after the granting of and before a new trial, are not applicable to the proceedings after the opening of an inquest and before a new trial,¹⁰⁰ nor to the proceedings after the withdrawal of a juror by one of the parties, and a new trial pursuant to an order of the judge restoring the case to the calendar;¹⁰¹ but these provisions only apply to those cases where the trial is actually completed, and a new trial is granted by an order setting aside the verdict, or the judgment entered thereon, and granting a new trial¹⁰² or a reversal of the judgment on appeal. This sum can be taxed on every new trial where the appellate court awards a new trial.¹⁰³ Where the defeated party moved for a reargument, but gave no security for a stay, the successful party was held entitled to tax \$25 costs after the granting of a new trial, and a trial fee where he placed the case on the calendar and held it till the motion for reargument was decided.¹⁰⁴ Whether the costs of the first trial can be included in

⁹⁷*Wessels v. Carr*, 22 Abb. N. C. 464, 6 N. Y. Supp. 535.

⁹⁸*Andrews v. Cross*, 17 Abb. N. C. 92; *Lennon v. MacIntosh*, 19 Abb. N. C. 175.

⁹⁹*Cohen v. Cohen*, 72 Hun, 393, 55 N. Y. S. R. 463, 25 N. Y. Supp. 387.

¹⁰⁰*Wessels v. Carr*, 22 Abb. N. C. 464, 6 N. Y. Supp. 535.

¹⁰¹*Bloch v. Linsley*, 40 Misc. 184, 81 N. Y. Supp. 661.

¹⁰²*Hamilton v. Butler*, 30 How. Pr. 36, 19 Abb. Pr. 446, 4 Robt. 654;

Hudson v. Erie R. Co. 57 App. Div. 98, 68 N. Y. Supp. 28; *Kummer v.*

Christopher & T. Street R. Co. 12 Misc. 387, 24 N. Y. Civ. Proc. Rep. 404, 67 N. Y. S. R. 404, 33 N. Y.

Supp. 581.

¹⁰³*Faber v. Van Tassell*, 4 Month.

L. Bull. 30.

¹⁰⁴*Van Gelder v. Hallenbeck*, 15 N.

the second trial, which has been granted by the judge, depends upon that order. They cannot be taxed, as of course. When they have been wrongly included, the party aggrieved should move to set aside the judgment for irregularity. These irregularities cannot be reached and brought up by exceptions upon an appeal from the judgment.¹⁰⁵

407. When the trial occupies more than two days.—A trial is completed and finished as regards the allowance for a case which occupies more than two days, when the case is finally submitted to the jury and they have retired to deliberate upon their verdict.¹⁰⁶ A trial occupies more than two days when the plaintiff finishes his case at the close of the second day, and the complaint is dismissed at the opening of court on the third day upon the defendant's motion, without the introduction of any further evidence.^{106a} The law takes no notice of fractions of days.¹⁰⁷ This charge may be included for every trial had, when it occupies more than two days.¹⁰⁸ The fact that counsel is given additional time to submit briefs is not to be considered in deciding whether the trial occupied more than two days.¹⁰⁹

408. Term fees. *a. Statute.*—The statute governing term fees is contained in § 3251, subds. 3, 4, 5, of the Code of Civil Procedure.

b. In the court of appeals.—The court of appeals holds but one term each year. Therefore, but one term fee can be

Y. Civ. Proc. Rep. 333, 18 N. Y. S. R. 19, 2 N. Y. Supp. 252; *Faber v. Van Tassell*, 4 Month. L. Bull. 30.

¹⁰⁵*Cochran v. Gottwald*, 9 Jones & S. 317; *Johnson v. Carnley*, 10 N. Y. 570, 61 Am. Dec. 762; *Ingersoll v. Bostwick*, 22 N. Y. 425; *Fitzhugh v. Wiman*, 9 N. Y. 559.

¹⁰⁶*Mygatt v. Willcox*, 35 How. Pr. 410; *Washburne v. Oliver*, 62 How. Pr. 482.

^{106a}*Mott v. Consumers' Ice Co.*, 8 Daly, 244.

¹⁰⁷*Mott v. Consumers' Ice Co.*, 8 Daly, 244. *Contra*, *Washburne v. Oliver*, 62 How. Pr. 482.

¹⁰⁸*Spring v. Day*, 44 How. Pr. 390.

¹⁰⁹*Evans v. Ferguson*, 10 N. Y. Civ. Proc. Rep. 57.

charged for each year, excluding the term at which the case was disposed of.¹¹¹

c. Case must be in a condition to be disposed of.—No term fee can be taxed by anyone until the case is at issue as to all parties,¹¹² although it is put on the calendar by a defendant who was ready for trial.¹¹³ A party is not entitled to term fees for those terms at which the case could not be moved on account of a stay granted therein.¹¹⁴ Term fees cannot be charged in the appellate division when the case is not in a condition to be considered by that court.¹¹⁵

d. Term fees for terms before the amendment of the complaint.—Term fees accruing before an amendment to a complaint are not taxable, because the amendment destroys the issue.¹¹⁶

A party who obtains judgment because of the frivolousness of an answer interposed cannot tax term fees for the terms that the case was on the calendar, because he could have obtained the same relief without putting it on the calendar.¹¹⁷

e. Effect of referring a case.—Where a case is referred upon motion before it is reached on the calendar, no term fee can be charged for that term, because it could have been referred without putting the case on the calendar.¹¹⁸ But when the case is

¹¹¹*Degener v. Underwood*, 31 Abb. Zine Min. Co. 4 Duer, 681, 2 Abb. N. C. 479, 62 N. Y. S. R. 121, 30 N. Pr. 255.

¹¹²*Bowen v. Sweeney*, 66 Hun. 42, Y. Supp. 399; *Becker v. Metropolitan Elev. R. Co.* 30 N. Y. Supp. 400; 49 N. Y. S. R. 603, 20 N. Y. Supp. *Palmer v. De Witt*, 42 How. Pr. 466; 733.

¹¹³*Shufelt v. Powers*, 13 How. Pr. 14 N. Y. Civ. Proc. Rep. 125, 3 N. Y. 89. *Contra, Simpson v. Rowan*, 13 Supp. 763; *Whiteman v. Leslie*, 1 N. Y. Civ. Proc. Rep. 206.

¹¹⁴*Nobis v. Pollock*, 18 N. Y. Civ. Proc. Rep. 1, 13 N. Y. Supp. 837; *Kahn v. Cohn*, 31 Abb. N. C. 478, 62 N. Y. S. R. 107, 30 N. Y. Supp. 347. *Van Gelder v. Hallenbeck*, 15 N. Y. Civ. Proc. Rep. 333, 18 N. Y. S. R. 19, 2 N. Y. Supp. 252.

¹¹⁵*Herzfeld v. Reinach*, 26 Misc. 489, 57 N. Y. Supp. 669.

¹¹⁶*Candee v. Ogilvie*, 5 Duer, 658.

¹¹⁷*Perry v. Livingston*, 6 How. Pr.

¹¹⁸*Livingston v. Vicille Montagne* 404.

referred by consent when it is reached on the call of the calendar, the successful party is entitled to a term fee for the term at which it was so referred.¹¹⁹ Term fees cannot be charged for terms after the case has been referred.¹²⁰

f. Where the successful party did not notice the case.—A cause is "necessarily on the calendar" within the meaning of subd. 3 of § 3251 of the Code of Civil Procedure, when it is at issue, and in readiness for trial.¹²¹ The successful party in an action is entitled to tax term fees for all the terms not exceeding five, exclusive of the term at which it is tried, that the case was on the calendar, although he never noticed it for trial.¹²² Where the condition has been imposed upon a party asking for a favor, that the case shall be placed on the calendar for those terms of court where there is no jury, fees for those terms may be taxed as though a jury was present.¹²³

g. Effect of consenting that case go over the term.—Term fees can be taxed for all terms that the case was put over by mutual consent.¹²⁴

h. Term fees paid for privilege of putting case over.—Whether a party who has been compelled to pay term fees for the privilege of putting a case over the term can be compelled to pay the costs for that term, if he is defeated, or can tax the fees for that term, if he is successful, depends upon the order made at the time the application for postponement was made. If the court grants the favor upon the payment of a sum equal to the term fees for that term, the successful party can tax the

¹¹⁹*Sipperly v. Warner*, 9 How. Pr. 332; *Fisher v. Hunter*, 15 How. Pr. 156. ¹²⁰*Crim v. Drain*, 64 App. Div. 581, 10 N. Y. Anno. Cas. 227, 72 N. Y. Supp. 298.

¹²¹*Anonymous*, 1 Duer, 651.

¹²²*Sipperly v. Warner*, 9 How. Pr. 332; *Deyo v. Morss*, 21 Misc. 497, 48 N. Y. Supp. 171. ¹²³*Ellsworth v. Parkes*, 13 N. Y. Civ. Proc. Rep. 208, note; *Fisher v. Hunter*, 15 How. Pr. 156; *Deyo v. Morss*, 21 Misc. 497, 48 N. Y. Supp.

¹²⁴*Vandercreek v. Warren*, 11 N. Y. Civ. Proc. Rep. 319; *Andrews v. Schmitz*, 16 Jones & S. 173, 2 N. Y. Civ. Proc. Rep. 18. *Contra*, *Crawford v. Kelly*, 10 Bosw. 697.

costs for that term. If, on the other hand, the case is postponed upon the payment of the costs of that term, those costs cannot be again taxed by either party. Such term fees are \$10, and such disbursements as the opposite party has incurred, as shown by his affidavit. In the absence of a proper affidavit the clerk can tax no disbursements.¹²⁵

i. Terms when case was on the wrong calendar.—Where a case has been put on the wrong calendar for several terms by both parties, and the case is finally placed on the proper calendar and tried, the term fees for the terms the case was on the wrong calendar can be taxed because the defeated party, having noticed the case for trial, is estopped from denying that it was properly there.¹²⁶ Where a judge refuses to decide a demurrer, and the parties withdraw their papers and both serve new pleadings, the successful party upon the issues raised by the new pleadings is not entitled to tax the costs of arguing the demurrer, because by withdrawing their papers from the court after the argument the parties waived their right to costs arising upon the demurrer.¹²⁷

j. Stipulation as to term fees.—Where parties stipulate that a case be put on the calendar for a certain term,¹²⁸ or that the costs of a certain term abide the event of the action, although it is in excess of the legal limit, the court will enforce the stipulation.¹²⁹ The parties may stipulate that the costs of a term, at which the case could not be heard because of the lack of jurisdiction of the court, abide the decision of the case, and the courts will enforce such a stipulation.¹³⁰

k. On appeal from justices' courts to county courts.—The provisions of § 3251 of the Code of Civil Procedure, relating to term fees in county courts, applies only to cases originally

¹²⁵*Sipperly v. Warner*, 9 How. Pr. 332; *Perry v. Livingston*, 6 How. Pr. 760.

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¹²⁶*Stanswood v. Benson Chemung Co.* 17 How. Pr. 490.

¹²⁷*Losee v. Bullard*, 54 How. Pr. 448.

¹²⁸*Putney v. Tyng*, 1 N. Y. S. R.

¹²⁹*Emmons v. New York & E. R.*

¹³⁰*Hager v. Danforth*, 8 How. Pr.

brought therein, and not to cases brought there by appeal from a justice's court, either upon questions of law or for a new trial.¹³¹ Term fees on such appeal are regulated by § 3073 of the Code of Civil Procedure. The same limit as to term fees is fixed by both sections.

l. Limit fixed by law.—Where there is a limit as to the number of term fees that are taxable, this number cannot be increased because there are several trials.¹³² Term fees are allowed for all terms within the legal limit that the case was necessarily on the general calendar awaiting trial.¹³³ Likewise, upon a motion for a new trial, term fees can be taxed for every term it is on the calendar and not reached.¹³⁴ But they are not taxable for a Saturday special term that has no calendar.¹³⁵ Nor are they chargeable where a party has noticed a demurrer before a judge at his chambers.¹³⁶

m. For what terms taxable upon a discontinuance.—A plaintiff may discontinue upon the day before the term opens,¹³⁷ or during the first term the case is on the calendar,¹³⁸ without being compelled to pay term fees.

No term fee can be charged where the case was settled before the opening of the term, although the case had been noticed for that term and a note of issue filed.¹³⁹ A term fee upon an appeal from an order is not allowable.¹⁴⁰

409. Interrogatories.—Under Code Proc. § 307, subd. 6,

¹³¹*Horning v. Smith*, 19 N. Y. Civ. Proc. Rep. 142; 11 N. Y. Supp. 790.

¹³²*Hamilton v. Butler*, 19 Abb. Pr. 446, 30 How. Pr. 36, 4 Robt. 654.

¹³³*Kahn v. Cohn*, 31 Abb. N. C. 478, 62 N. Y. S. R. 107, 30 N. Y. Supp. 347; *Sipperly v. Warner*, 9 How. Pr. 332; *Gowing v. Lecky*, 43 N. Y. S. R. 767, 17 N. Y. Supp. 771; *Simpson v. Rowan*, 13 N. Y. Civ. Proc. Rep. 206.

¹³⁴*Malam v. Simpson*, 12 Abb. Pr. 225, 20 How. Pr. 488; *Moore v. Cockcroft*, 9 How. Pr. 479; *Jackett v. Judd*, 18 How. Pr. 388, not followed.

¹³⁵*Wright v. Reusens*, 39 N. Y. S. R. 802, 15 N. Y. Supp. 504.

¹³⁶*Losee v. Bullard*, 54 How. Pr. 319.

¹³⁷*Drew v. Comstock*, 17 How. Pr. 469.

¹³⁸*Erans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298.

¹³⁹*Latham v. Bliss*, 13 How. Pr. 416, 6 Duer, 661.

¹⁴⁰*Ennis v. Wilder*, 14 N. Y. Week-Dig. 211.

only \$10 could be allowed for drawing interrogatories to be attached to a commission, although more than one witness was to be examined.¹⁴¹ This is still the rule under § 3251 of the Code of Civil Procedure. The disbursements upon the commission must be shown to be necessary to be taxed. If the commission was issued in good faith, although it did not substantiate what it was intended to, or if taken in a cause of action in which the plaintiff failed, yet, if he is entitled to general costs, he is entitled as a matter of right to tax the costs of the commission.¹⁴²

A party is entitled to this charge, although the interrogatories have never been served.¹⁴³ The expense of a commission issued at the request of a party, to take his testimony, when he could have attended the trial, cannot be allowed.¹⁴⁴ But the expense of taking a party's testimony when it is absolutely necessary, and he is prevented by sickness from attending, is a taxable disbursement.¹⁴⁵

If the commission is issued to take the testimony of the party and other witnesses, the expense is a taxable disbursement,¹⁴⁶ although the party could have attended the trial.

When the commission is executed outside the state, the fees of the commission and of the witnesses are properly taxable at the same rate as under our statute, unless it appears that the fees of witnesses were different where the commission was executed, and that the attendance of the witnesses could not have been compelled without the paying of such fees. The expense of an attorney upon the taking of the evidence cannot be taxed, any more than it could be here.¹⁴⁷ The expense of taking testimony

¹⁴¹*Johnson v. Chappell*, 7 Daly, 43;
O'Brien v. Commercial F. Ins. Co.
6 Jones & S. 4.

¹⁴²*Burns v. Delaware. L. & W. R. Co.* 135 N. Y. 263, 48 N. Y. S. R. 106, 31 N. E. 1080, Overruling in effect *Marston v. Hebert*, 60 How. Pr. 490.

¹⁴³*Evans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298.

¹⁴⁴*Delcomyn v. Chamberlain*, 7 Jones & S. 359.

¹⁴⁵*Pyne v. National S. S. Co.* 44 N. Y. S. R. 791, 18 N. Y. Supp. 166.

¹⁴⁶*Simpson v. Rowan*, 13 N. Y. Civ. Proc. Rep. 206.

¹⁴⁷*Finch v. Calvert*, 13 How. Pr. 13;
Dunham v. Sherman, 11 Abb. Pr.

by stipulation cannot be taxed, as it comes under no provisions of the Code of Civil Procedure.¹⁴⁸ Where the parties stipulate under § 879 of the Code of Civil Procedure to take the evidence of witnesses as though it had been taken under §§ 872 and 873, the prevailing party is entitled to tax \$10 for each witness.¹⁴⁹ To entitle a party to tax the expenses of obtaining exemplified copies of foreign documents, he must show by affidavit that the documents were actually and necessarily used or obtained for use.¹⁵⁰

410. Examination of a party before trial.— Where two parties having the same attorney obtain an order to examine the same defendant before trial, but only one examines him, costs of \$10 in each case will be allowed the defendant upon a discontinuance of both actions.¹⁵¹

411. Printing papers on appeals.— The successful party on an appeal can tax, as a disbursement, the costs of printing the case, in the absence of evidence that the sum charged was fraudulently or collusively exaggerated, or more than the usual charge at the place of his residence.¹⁵² The court can refuse to allow the successful party to tax the full amount of his disbursements for printing his points, when they contain irrelevant matter,—such as an argument *in extenso*.¹⁵³ Where an appellant to the appellate division has enough copies printed so that he will have enough books to go to the court of appeals, and the appellate division affirms, and the appellant appeals to the court of appeals, adding a few pages to his appeal book, he can tax, in case he is successful, for his disbursements in the court of appeals, only

152, 19 How. Pr. 572. *Contra*, *Perry* How. Pr. 216; *De Witt v. Swift*, 3 N. Y. Griffin, 7 How. Pr. 263. How. Pr. 282.

¹⁴⁸*Newman v. Greiff*, 3 N. Y. Civ. Proc. Rep. 362. ¹⁵¹*Steiner v. Ainsworth*, 53 How. Pr. 31.

¹⁴⁹*Smith v. Servis*, 59 Hun, 552, 36 N. Y. S. R. 917, 13 N. Y. Supp. 941. ¹⁵²*Salter v. Utica & B. River R. Co.* 86 N. Y. 401.

¹⁵⁰*Hanel v. Baare*, 9 Bosw. 682; ¹⁵³*Corbett v. DeComeau*, 13 Jones Case v. Price, 9 Abb. Pr. 111, 17 & S. 587. How. Pr. 348; *Haynes v. Mosher*, 15

what he paid for printing the additional pages.¹⁵⁴ Where the appellant prints enough cases to go to the court of appeals, and wins at the appellate division, and the appellant to the court of appeals purchases enough cases of him to make his appeal, and the court of appeals affirms, the successful party need not deduct from his printing bill the amount realized from his opponent upon the sale of his extra cases.¹⁵⁵

A party who prints more cases than are necessary cannot charge the extra expense against his opponent.¹⁵⁶ Where it appears that by special agreement a case could be printed for less than \$1 per page, but in the absence of a special agreement the usual charge was \$1 per page, and the successful party had agreed to pay \$1 per page if he won, it was held that he could tax his printing at that figure.¹⁵⁷ A respondent who obtains leave of the court to print all papers improperly omitted will not be allowed for printing papers not mentioned in the order.¹⁵⁸ Where certain papers are printed at the request of some of the parties, and by the direction of the referee, the expense of this printing is a proper disbursement.¹⁵⁹ Upon an appeal from an order the court may allow the successful party, in addition to the costs, the disbursements of printing the papers and points,¹⁶⁰ but if the affirmance or reversal is "with costs," and no mention is made of disbursements, none can be taxed.¹⁶¹ Where several parties unite in an appeal, and some are successful and some are not, the successful parties will not be allowed to tax the charge for printing, without proof that they incurred the expense.¹⁶²

¹⁵⁴*Potter v. Carpenter*, 56 How. Pr. 89.

¹⁵⁹*Veeder v. Judson*, 91 N. Y. 374.

¹⁵⁵*Consalus v. Brotherson*, 54 How. Pr. 62.

¹⁶⁰*Erie R. Co. v. Ramsey*, 10 Abb. Pr. N. S. 109.

¹⁵⁶*Byrnes v. Labagh*, 12 N. Y. Civ. Proc. Rep. 417, 10 N. Y. S. R. 728.

¹⁶¹*Cassidy v. McFarland*, 139 N. Y. 201, 34 N. E. 893; *Re Steencken*, 58 App. Div. 85, 9 N. Y. Anno. Cas. 413, 68 N. Y. Supp. 444.

¹⁵⁷*Van Gelder v. Hallenbeck*, 15 N. Y. Civ. Proc. Rep. 333, 18 N. Y. S. R. 19, 2 N. Y. Supp. 252.

¹⁶²*Kane v. Metropolitan Elev. R. Co.*, 15 Daly, 366, 28 N. Y. S. R. 399, 7 N. Y. Supp. 653; *Schoonmaker v. Bonnie*, 51 Hun, 34, 16 N. Y. Civ.

¹⁵⁸*Stubbs v. Ripley*, 7 N. Y. S. R. 473, 28 N. Y. Week. Dig. 508.

412. Advertising sales of property.—The amount of fees of a printer for advertising the sale of property, or for publishing a summons, notice, order, citation, or other advertisement required by law, is fixed by § 3317 of the Code of Civil Procedure at 75 cents per folio for the first insertion, and 50 cents for each subsequent insertion, except that in counties containing wholly or partly cities of the first class, the charge may be \$1 per folio for the first insertion, and 75 cents for each subsequent insertion.

A sheriff who is stopped by an injunction obtained by the defendant, from selling real estate upon a judgment, after advertising it, and who adjourns the sale, may deduct his bill for advertising from the proceeds, when they are large enough to cover the judgment and this expense.¹⁶³ In an action in partition the plaintiff was allowed to tax telegrams and the expenses of lithographing the summons and complaint, there being a special affidavit of the necessity of these disbursements, and no opposing affidavits.¹⁶⁴ The expense of adjourning a sale, including advertising, may be taxed, though it was incurred after the notice of appeal was served, but before the sureties had justified.¹⁶⁵

413. Fees of referees. *a. Statute.*—The fees of a referee are fixed at \$10 per day, unless the court or judge fixes a smaller amount or the parties stipulate that he may have a larger sum.¹⁶⁶ The fees of a referee appointed to take testimony under § 873 of the Code of Civil Procedure are not embraced within the provisions of § 3296, but are taxable under the provisions of § 3256, which provides that the reasonable compensation of commissioners for taking depositions are a taxable disbursement.¹⁶⁷

b. Stipulation that fees may be larger than the statutory rate.

Proc. Rep. 64, 28 N. Y. S. R. 428, 3 N. Y. Supp. 492.

¹⁶³*Van Gelder v. Van Gelder*, 26 Hun. 356.

¹⁶⁴*Douglass v. Atirell*, 3 N. Y. Civ. Proc. Rep. 80, 2 N. Y. Civ. Proc. Rep. (McCarty) 390.

¹⁶⁵*Ward v. James*, 8 Hun. 526.

¹⁶⁶Code Civ. Proc. § 3296.

¹⁶⁷*Reichel v. New York C. & H. R. R. Co.* 18 N. Y. Civ. Proc. Rep. 256, 29 N. Y. S. R. 841, 9 N. Y. Supp. 415.

—In the absence of an agreement the referee is entitled to charge no more than the legal fee, \$10 per day. The parties or their attorneys may sign an agreement that the referee have a larger amount,¹⁶⁸ or the amount may be inserted in the minutes before the commencement of the reference.¹⁶⁹ It is not sufficient that the parties agree orally that the referee may fix his own fees, which agreement is afterwards noted in the minutes.¹⁷⁰ If one of the parties agrees orally that the referee may charge a sum in excess of the legal rate, but, after the reference and before the report is made, refuses to sign a stipulation to that effect, the referee is only entitled to charge the legal rate.¹⁷¹ A stipulation that the referee should charge a certain sum for "every hearing" does not entitle him to charge for days appointed for hearings when in advance of the time appointed the parties had countermanded such appointment.¹⁷² The court will, in the absence of fraud, collusion, or deceit, enforce an agreement made by the attorneys of the parties that the referee's fees be in excess of that allowed by law.¹⁷³ A receiver will not be allowed to consent to such an increase of the fees of a referee without the permission of the court.¹⁷⁴ A stipulation in writing as to fees of the referee, and that each party should pay one half, will be enforced.¹⁷⁵

c. Proof of the number of days occupied upon the reference.

¹⁶⁸*Mark v. Buffalo*, 87 N. Y. 183; 21 N. Y. Supp. 451; *Re Hurd*, 6 Code Civ. Proc. § 3296. Misc. 171, 31 Abb. N. C. 109, 56 N.

¹⁶⁹*Townsend v. Peyser*, 14 Abb. Pr. Y. S. R. 694, 26 N. Y. Supp. 893; N. S. 324, 45 How. Pr. 211; *Phillin Brown v. Sears*, 23 Misc. 559, 52 N. Y. Supp. 792.

Whitney, 9 Abb. Pr. 71; *Thurman Dickinson v. Earle*, 63 App. Div. v. *Fiske*, 30 How. Pr. 397; *Brown v.* 140, 71 N. Y. Supp. 231.

Windmuller, 4 Jones & S. 71, 14 Abb. ¹⁷²*Mead v. Tuckerman*, 105 N. Y. 557, 8 N. Y. S. R. 182, 12 N. E. 64.

¹⁷⁰*Derlin v. New York*, 7 Daly, 466; ¹⁷³*Wolff v. Horn*, 9 Misc. 100, 59 N. Y. S. R. 719, 29 N. Y. Supp. 75.

First Nat. Bank v. Tamajo, 77 N. Y. 476; *Chase v. James*, 16 Hun. 14; ¹⁷⁴*People v. Continental L. Ins. Co.* 15 N. Y. Week. Dig. 569.

Griggs v. Day, 135 N. Y. 469, 32 N. E. 238; *Griggs v. Guinn*, 23 N. Y. Civ. Proc. Rep. 46, 29 Abb. N. C. 144, 153. ¹⁷⁵*Brick v. Fowler*, 61 How. Pr. -

—Before a referee's fees can be taxed, a statement showing the time occupied by the reference is required.¹⁷⁶ If the question of the number of days for which a referee has received pay is to be raised on appeal, it should be pointed out upon a motion for readjustment of costs, pointing out the errors, or by procuring a return of the facts showing that the referee has overcharged.¹⁷⁷

In all cases where objection is made to a disbursement for referee's fees, that disbursement should be supported by affidavit. A general affidavit by the attorney is not sufficient. The affidavit of the referee would be the best evidence, or the parties might waive his affidavit and accept his certificate.¹⁷⁸ The affidavit should show that the time for which a charge for fees of a referee is made was necessarily required and spent in the business of the reference.¹⁷⁹ He is entitled to fees for a full day, for every day that he was present, ready to take testimony, but adjourned the hearing at the request of the parties, made at that time.¹⁸⁰ But where the hearing was adjourned before the day set for the hearing arrived, he cannot charge for that day.¹⁸¹ Nor can he charge for a day's time upon the mere filing of one paper,¹⁸² nor for examining the testimony and exhibits, in addition to a general study of the case: but he can charge for the preparation of his opinion and report,¹⁸³ and he is entitled to charge for the time reasonably spent in the investigation and consideration of the case after its submission.¹⁸⁴

¹⁷⁶*Gilbert v. Deshon*, 40 N. Y. S. R. 33 N. Y. S. R. 823, 11 N. Y. Supp. 799, 16 N. Y. Supp. 36. ¹⁷⁷*Finkel v. Kohn*, 24 Misc. 367, 510.

¹⁷⁸*Kearney v. McKeon*, 85 N. Y. 53 N. Y. Supp. 694; *Brush v. Kelsey*, 136; *Hannahs v. Hannahs*, 5 Hun. 47 App. Div. 270. 62 N. Y. Supp. 644; *First Nat. Bank v. Tamajo*, 77 214; *Fay v. Muhtker*, 13 Daly, 316. N. Y. 476. ¹⁷⁹*Jead v. Tuckerman*, 105 N. Y.

¹⁸⁰*Brown v. Windmuller*, 4 Jones & 557, 8 N. Y. S. R. 182, 12 N. E. 64; S. 75, 14 Abb. Pr. N. S. 359; *Shultz Brush v. Kelsey*, 47 App. Div. 270, v. *Whitney*, 9 Abb. Pr. 71; *Duhrkop* 62 N. Y. Supp. 214. v. *White*, 13 App. Div. 293, 43 N. Y. ¹⁸²*Jones v. Newton*, 33 N. Y. S. R. Supp. 190. 823, 11 N. Y. Supp. 510.

¹⁸¹*Re Piatti*, 26 Misc. 434, 56 N. Y. ¹⁸³*Finkel v. Kohn*, 24 Misc. 367, 53 N. Y. Supp. 132. ¹⁸⁴*Herschell v. Rogers*, 2 Month. L.

¹⁸⁰*Blanch v. Spies*, 31 Misc. 19, 62 ¹⁸¹*Herschell v. Rogers*, 2 Month. L. N. Y. Supp. 1039; *Jones v. Newton*, Bull. 14; *Brown v. Windmuller*, 14

d. Two actions tried before the same referee.—Where two actions between the same parties are tried before the same referee, a stipulation may be made that one half of the fees be charged in each case. Upon the dismissal of the complaint in one action, only one half of the fees of the referee to that time can be charged in that case.¹⁸⁵ But the costs will not be thus apportioned in the absence of such a stipulation, especially where the cases are in different courts.¹⁸⁶ Where two actions are tried together, the evidence being applicable to each, only one fee can be charged for each day.¹⁸⁷ A referee who decides several cases on the same day can charge fees in but one case.¹⁸⁸

e. How the referee's fees can be collected.—A referee, until he is paid his fees, is not bound to deliver his report to the successful party or file it with the clerk. But if he does not do one or the other the reference may be terminated, under § 1019 of the Code of Civil Procedure, at any time after sixty days from the time when the cause or matter was finally submitted to him, and before the report had been filed with the clerk or delivered to the attorney for one of the parties.

If the reference is thus terminated the referee is not entitled to his fees.¹⁸⁹ Any notice is sufficient to end the reference if it informs the opposite party that the party serving the notice elects to end the reference.¹⁹⁰ The referee's report must actually be delivered to one of the parties or filed with the clerk, to

Abb. Pr. N. S. 366; *Skultz v. Whitney*, 9 Abb. Pr. 77; *Rothschild v. Werner*, 4 Month. L. Bull. 28.

¹⁸⁵*Colton v. Simmons*, 14 Hun. 75. 6 N. Y. Week. Dig. 530; *Byrne v. Groot*, 5 Month. L. Bull. 56; *Brown v. Sears*, 23 Misc. 559. 52 N. Y. Supp. 792.

¹⁸⁶*Holmes & G. Mfg. Co. v. Morse*, 28 Abb. N. C. 133. 19 N. Y. Supp. 190.

¹⁸⁷*Byrne v. Groot*, 5 Month. L. Bull. 56.

¹⁸⁸*People v. Continental L. Ins. Co.* 15 N. Y. Week. Dig. 569; *Disosway v. Winant*, 3 Keyes, 412. 1 Abb. App. Dec. 508. 33 How. Pr. 460.

¹⁸⁹*Douglas v. Smith*, 65 Hun. 11. 47 N. Y. S. R. 54. 19 N. Y. Supp. 630; *Niles v. Maynard*, 28 How. Pr. 390; *Birdseye v. Goddard*, 17 N. Y. Week. Dig. 228.

¹⁹⁰*Gregory v. Cryder*, 10 Abb. Pr. N. S. 289.

prevent a termination of the references, as provided in § 1019 of the Code of Civil Procedure.¹⁹¹ He cannot protect himself by delivering the report to one of the attorneys, unless it is delivered to him unconditionally.¹⁹² If he delivers his report to one of the attorneys or files it before his fees are paid, he can maintain an action against all the parties to recover his fees, upon the ground that he was employed by all the parties,¹⁹³ or he may sue the prevailing party.¹⁹⁴ The attorneys are not liable for his fees, as they are the known agents of their clients.¹⁹⁵ Nor can the supreme court, by order, compel the successful party to pay the referee's fees and take up his report.¹⁹⁶ The court will not compel, by contempt proceedings, the payment by a receiver of the fees of a referee who passes upon his accounts, where the order requiring the payment was made by a judge other than the one before whom the motion was first made, and the order does not recite regular adjournments.¹⁹⁷ Upon a motion to compel a referee to file his report, which is resisted on the ground that his fees have not been paid, the court has not the power to determine the amount of his fees when neither party request such determination.¹⁹⁸ A referee to take the account of a fund in court may have his fees paid in the first instance out of the fund, in the discretion of the court.¹⁹⁹ A stipulation that the successful party may pay part of the fees of the referee and that the bal-

¹⁹¹*Little v. Lynch*, 99 N. Y. 112, 1 N. E. 312; *Phipps v. Carman*, 23 Hun, 150, Affirmed without opinion in 84 N. Y. 650, disregarding *Waters v. Shepherd*, 14 Hun, 223, which is now overruled by the above cases; *Thornton v. Thornton*, 66 How. Pr. 119; *Bishop v. Bishop*, 30 Abb. N. C. 296, 24 N. Y. Supp. 888.

¹⁹²*Douglas v. Smith*, 65 Hun, 11, 47 N. Y. S. R. 54, 19 N. Y. Supp. 630.

¹⁹³*Russell v. Lyth*, 66 App. Div. 290, 10 N. Y. Anno. Cas. 287, 72 N. Y. Supp. 615.

¹⁹⁴*Little v. Lynch*, 99 N. Y. 112, 1 N. E. 312.

¹⁹⁵*Howell v. Kinney*, 1 How. Pr. 105; *Judson v. Gray*, 11 N. Y. 403.

¹⁹⁶*Geb v. Topping*, 83 N. Y. 46; *Bishop v. Bishop*, 30 Abb. N. C. 296, 24 N. Y. Supp. 888.

¹⁹⁷*Perkins v. Taylor*, 19 Abb. Pr. 146.

¹⁹⁸*Brush v. Kelsey*, 47 App. Div. 270, 62 N. Y. Supp. 214.

¹⁹⁹*Atty. Gen. v. Continental L. Ins. Co.* 93 N. Y. 45; *Clapp v. Clapp*, 33 Hun, 540; *Re Merry*, 11 App. Div. 597, 42 N. Y. Supp. 617; *Re Hurd*, 6 Misc. 171, 31 Abb. N. C. 109, 56 N. Y. S. R. 694, 26 N. Y. Supp. 893.

ance be a lien on the judgment will be enforced.²⁰⁰ A referee who has collected more fees than is allowed on the taxation may be compelled by an order of the court made in that action, to refund the excess collected by him.²⁰¹

f. Extension of time to report.—The parties may, by agreement, extend the time beyond sixty days, in which to file the report. If the extension is for a definite time, either party may terminate the reference upon the expiration of the stipulated time.²⁰² If the time has been extended indefinitely, the party wishing to terminate the reference should serve a notice upon the opposite party and the referee, that, unless the report is filed within a specified and reasonable time, the reference will be deemed ended.²⁰³ Where a stipulation was made after the death of one of several referees, that the remaining referees make the report, the statutory time within which the report must be filed runs from the time of that stipulation.²⁰⁴ The statutory time may be extended without a formal stipulation. The time may be extended when the report is withheld at the request of the parties who were making arrangements to settle the action.²⁰⁵ It may also be extended by any conduct that in fairness estops the litigant from taking advantage of the strict letter of the law,—such as requesting a report in the near future.²⁰⁶

If neither party elects to terminate the reference the report of the referee, though filed after the sixty days have expired, is sufficient.²⁰⁷ The objection that the referee did not file his

²⁰⁰*Birdseye v. Goddard*, 17 N. Y. Week. Dig. 228.

²⁰¹*Duhrkop v. White*, 13 App. Div. 293, 43 N. Y. Supp. 190.

²⁰²*Patterson v. Knapp*, 83 Hun. 492, 24 N. Y. Civ. Proc. Rep. 251, 65 N. Y. S. R. 188, 32 N. Y. Supp. 32.

²⁰³*Ballou v. Parsons*, 55 N. Y. 673; *Sproull v. Star Co.* 45 App. Div. 575, 61 N. Y. Supp. 404.

²⁰⁴*Berls v. Metropolitan Elev. R. Co.* 37 N. Y. S. R. 608, 15 N. Y. Supp. 155.

²⁰⁵*Dwyer v. Hoffman*, 39 Hun. 360, Affirmed in 102 N. Y. 725.

²⁰⁶*Gill v. Clark*, 31 Misc. 337, 65 N. Y. Supp. 406.

²⁰⁷*Nealis v. Meyer*, 21 Misc. 344, 47 N. Y. Supp. 156; *O'Neill v. Howe*, 16 Daly, 181, 9 N. Y. Supp. 746; *Foster v. Bryan*, 26 How. Pr. 164, 16 Abb. Pr. 396; *Mantles v. Myle*, 26 How. Pr. 409; *Livingston v. Gidney*, 25 How. Pr. 1; *Parker v. Baxter*, 19 Hun, 410.

report within the time limited by law cannot be raised for the first time upon appeal.²⁰⁸

g. When the court has no power to refer the action.—Where the court has no power to refer an action the prevailing party cannot recover the fees of the referee and stenographer.²⁰⁹

h. Misconduct of referee.—Where the special term sets aside the report of the referee and the judgment entered thereon, on account of the misconduct of the referee, and orders a new trial before another referee, the costs of the reference fall with the judgment.²¹⁰

i. Reference ordered upon a motion.—The court may send a motion to a referee to determine a disputed question of fact. His fees are a taxable disbursement.²¹¹

j. Reference not completed.—Disbursements for referee's fees when incurred in the regular prosecution of an action are taxable. Thus, where a plaintiff obtains a reference to ascertain his damages upon the defendant's default, and the default is opened and no mention is made of the referee's fees, the plaintiff, upon succeeding in the action, can tax the referee's fees.²¹² The defendant in an equity action will be compelled to pay the costs of a reference caused by his own wilfulness, although the plaintiff recovers but 6 cents damages.²¹³

k. Referee to sell upon a mortgage foreclosure.—The fees of a referee upon a sale of mortgaged premises are regulated by § 3297 of the Code of Civil Procedure and are the same as are allowed to a sheriff under subds. 7, 11, of § 3307 of the Code.

²⁰⁸*Nealis v. Meyer*, 21 Misc. 344, 47 N. Y. Supp. 156.

²⁰⁹*Barber v. Lane*, 60 App. Div. 87, 69 N. Y. Supp. 739; *Godding v. Porter*, 17 Abb. Pr. 374.

²¹⁰*Dickinson v. Earle*, 63 App. Div. 140, 71 N. Y. Supp. 231; *New York Note Engraving & Printing Co. v. Hamilton Bank*, 71 App. Div. 611, 75 N. Y. Supp. 520.

²¹¹Code Civ. Proc. § 3251; *Brown v. Gallaudet*, 19 Alb. L. J. 97; *Nichter v. Lehmann*, 15 Misc. 447, 72 N. Y. S. R. 788, 37 N. Y. Supp. 208.

²¹²*New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 56 App. Div. 488, 67 N. Y. Supp. 827.

²¹³*Bowe v. Brown*, 4 N. Y. S. R. 456, 26 N. Y. Week. Dig. 47.

He is entitled to his disbursements and to \$2 for posting notice of sale, and 3 per cent upon the first \$250 and 2 per cent upon the balance, except in the counties of New York, Kings, and Westchester, in which counties he is entitled to $2\frac{1}{2}$ per cent upon the first \$250 and $1\frac{1}{4}$ per cent on the balance. The fees of the referees are fixed by the Code of Civil Procedure, and the fact that they are the same as the fees of the sheriffs in the various counties will not cause the fees to vary to meet the change in the compensation of the different sheriffs, when that change is made by an independent act, and not by an amendment to § 3307 of the Code of Civil Procedure.²¹⁴ But where the referee is required to take security upon a sale, or to distribute or apply, or ascertain and report upon the distribution or application of, any of the proceeds of sale, he is also entitled to one half of the commissions upon the amount so secured, distributed, or applied, allowed by law to an executor or administrator for receiving and paying out money. The referee is entitled to these commissions when he pays out the money to parties entitled thereto, or makes payments upon encumbrances, as directed by the court.²¹⁵ The fees cannot exceed \$50,²¹⁶ unless the property sells for \$10,000 or upwards, in which event he may receive such additional compensation as to the court may seem proper.²¹⁷ This additional compensation is not granted to the referee unless he has actually received and become accountable for the sum of \$10,000 or more.²¹⁸ They cannot exceed that sum, although, on account of defects, he has been compelled to sell the property more than once.²¹⁹ Under the Revised Stat-

²¹⁴*Keim v. Keim*, 43 App. Div. 88. ²¹⁸*Hosmer v. Gano*, 14 Misc. 229, 59 N. Y. Supp. 366, in effect over- 25 N. Y. Civ. Proc. Rep. 100, 70 N. ruling *Schierloh v. Schierloh*, 22 Y. S. R. 169, 35 N. Y. Supp. 471; Misc. 637, 49 N. Y. Supp. 1062. *Metropolitan L. Ins. Co. v. Bend-*

²¹⁵*Race v. Gilbert*, 102 N. Y. 298, *heim*, 59 N. Y. Supp. 793; *Dime Sav.* 10 N. Y. Civ. Proc. Rep. 1, 1 N. Y. *Bank v. Petit*, 59 N. Y. Supp. 794. S. R. 661, 6 N. E. 592.

²¹⁶*Maher v. O'Conner*, 1 N. Y. Civ. ²¹⁹*Caryl v. Stafford*, 69 Hun. 318, 53 N. Y. S. R. 426, 23 N. Y. Supp. Proc. Rep. 158, 61 How. Pr. 103. 534.

²¹⁷ Code Civ. Proc. § 3297.

ute he was held entitled to 50 cents for receiving and entering the decree in his book, and \$2 for advertising the property for sale.²²⁰ The fees should be taxed when there is a dispute as to the amount.²²¹ In the absence of express authority in the judgment, he has no right to allow the purchaser to deduct from his bid the costs taxed in a judgment on the foreclosure of a prior mortgage.²²²

l. Referee to sell in a partition action.—A referee cannot tax, as a disbursement, advertisements of the sale in the daily papers,²²³ and the court has not the power to authorize such an expenditure.²²⁴ Under the Revised Statute the referee's fees could be computed only upon the amount of money received and paid out, and not upon the encumbrances, subject to which the property was sold.²²⁵ These decisions are, doubtless, in point now.

The fees of a referee in a partition action, an action for dower, or any judicial sale, are the same as in an action brought to foreclose a mortgage, except that the limitation of the amount of fees is \$500 instead of \$50. See preceding subdivision of this section.²²⁶ Where the court orders the money paid into court and makes its own distribution under §§ 1563, 1568, and 1570 of the Code, the referee will not be entitled to commissions. A referee receives more than a sheriff, because in paying money his duty requires that he shall be able to follow the judgment.²²⁷

414. Fees of stenographer. *a. In general.*—The authority for taxing fees of stenographers as a disbursement is found in

²²⁰*Walbridge v. James*, 16 Hun, 8. *Allen v. Williamson*, 21 Abb. N. C.

²²¹*Ward v. James*, 8 Hun, 526; 391.

Innes v. Pureell, 1 Hun, 318, 2
Thomp. & C. 538, 541.

²²²*Strauss v. Hellman*, 58 How. Pr.
377.

²²³*Termansen v. Matthews*, 49 App.
Div. 163, 63 N. Y. Supp. 115.

²²⁴*Maher v. O'Conner*, 61 How. Pr.
103, 1 N. Y. Civ. Proc. Rep. 158.

²²⁵*Stewart v. Paton*, 23 N. Y. Civ.
Proc. Rep. 286, 29 N. Y. Supp. 770.

²²⁶*Race v. Gilbert*, 102 N. Y. 298,
10 N. Y. Civ. Proc. Rep. 1, 1 N. Y.

²²⁷*Baldwin v. Baldwin*, 23 N. Y.
Civ. Proc. Rep. 287, note. *Contra*,

S. R. 661, 6 N. E. 592.

the last part of § 3256 of the Code of Civil Procedure, which says that a party entitled to costs may tax as a disbursement "such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law."

This section was amended by chap. 185 of the Laws of 1895, which added the provision that stenographers' fees for minutes of testimony before a court, judge, or referee should constitute a taxable disbursement. This amendment never went into effect, because, during the same session of the legislature, § 3256 of the Code of Civil Procedure was again amended by chap. 595, which omitted the provision as to stenographers' fees, and went into effect the same day that the first amendment did.

b. Incurred upon a reference.—The fees of a stenographer for taking testimony upon a reference is not a taxable disbursement, in the absence of a stipulation to that effect.²²⁸ This is true, although the parties agree to employ a stenographer to take minutes, and to share the expense equally, because the stenographer before the referee is not an officer of the court.²²⁹ But where there is a stipulation between the parties that the successful party should pay the stenographer's bill and tax the sum thus paid as a disbursement in the action, the courts will enforce the stipulation.²³⁰ The attorney can bind his client by such a stipulation.²³¹

²²⁸*Griggs v. Guinn*, 29 Abb. N. C. Bull. 56; *Sebley v. Nichols*, 32 How. 144, 23 N. Y. Civ. Proc. Rep. 46, 21 Pr. 182.

N. Y. Supp. 451; *Seasongood v. New York Elev. R. Co.* 22 N. Y. Civ. Proc. Rep. 100, 46 N. Y. S. R. 832, 18 N. Y. Supp. 775; *Gallagher v. Baird*, 60 App. Div. 29, 10 N. Y. Anno. Cas. 58, 69 N. Y. Supp. 676; *Nugent v. Keenan*, 21 Jones & S. 530; *Colton v. Simmons*, 14 Hun, 75; *Anderson v. E. De Braekeleer & Co.* 25 Misc. 343, 28 N. Y. Civ. Proc. Rep. 306, 55 N. Y. Supp. 721; *Newhall v. Appleton*, 4

²²⁹*Seasongood v. New York Elev. R. Co.* 22 N. Y. Civ. Proc. Rep. 100, 46 N. Y. S. R. 832, 18 N. Y. Supp. 775. ²³⁰*Wolff v. Horn*, 9 Misc. 100, 59 N. Y. S. R. 719, 29 N. Y. Supp. 75; *Clegg v. Aikens*, 17 Abb. N. C. 88, 8 N. Y. Civ. Proc. 249; *Brown v. Sears*, 23 Misc. 559, 27 N. Y. Civ. Proc. Rep. 412, 52 N. Y. Supp. 792; *Blanck v. Spies*, 31 Misc. 19, 62 N. Y. Supp. 1039.

Month. L. Bull. 6; *Mark v. Buffalo*, 87 N. Y. 184, 13 N. Y. Week. Dig. 415; *Byrne v. Groot*, 5 Month. L. ²³¹*Query v. Cooney*, 34 Misc. 161, 68 N. Y. Supp. 800.

The defeated party may question the amount of this disbursement in the same way that he would any other disbursement.²³²

If the stipulation provides that both parties shall pay a portion of the fees of the stenographer, and the successful party can tax the amount thus paid in his bill of costs as a disbursement, the successful party may include in his bill of costs the part thus paid by him,²³³ although the party against whom he taxes his costs succeeds as to all the other parties.²³⁴ Before the fees of a stenographer can be taxed, a statement of the time occupied by the reference and the extent of services of the stenographer should be required.²³⁵

c. Obtained to prepare case on appeal.—Where a party obtains a copy of the stenographer's minutes to prepare a case and exceptions, the expense of such a copy is properly taxed by him as a disbursement.²³⁶ The amount paid by the successful party for a copy of the stenographer's minutes is a proper disbursement, when it appears that it was necessary for him to procure such copy to enable him to prepare amendments to his opponent's case, as required by Rule 32 of the General Rules of Practice.²³⁷ Under the Code of Procedure such a disbursement was taxable.²³⁸ There is a class of earlier cases which hold that, under no circumstances, can stenographers' fees be a taxable disbursement.²³⁹ But this class of cases have now very little authority in the face of the recent decisions.

²³²*Wolff v. Horn*, 9 Misc. 100, 59 26 Jones & S. 569, 38 N. Y. Civ. Proc. N. Y. S. R. 719, 29 N. Y. Supp. 75. Rep. 350, 31 N. Y. S. R. 404, 9 N. Y.

²³³*Brown v. Sears*, 23 Misc. 559, 27 Supp. 707; *Park v. New York C. & N. Y. Civ. Proc. Rep. 141*, 52 N. Y. H. R. R. Co. 57 App. Div. 569, 68 Supp. 792. N. Y. Supp. 460, 1145; *Ridabock v.*

²³⁴*Clegg v. Aikens*, 17 Abb. N. C. 88, 8 N. Y. Civ. Proc. Rep. 249. *Metropolitan Elev. R. Co.* 8 App. Div. 309, 75 N. Y. S. R. 336, 40 N. Y.

²³⁵*Gilbert v. Deshon*, 40 N. Y. S. R. Supp. 938; *Cutter v. Morris*, 41 Hun, 799, 16 N. Y. Supp. 36. 575, 26 N. Y. Week. Dig. 254, 7 N. Y.

²³⁶*Varnum v. Wheeler*, 9 N. Y. Civ. S. R. 426. ²³⁷*Schley v. Nichols*, 32 How. Pr. Proc. Rep. 421; *Cutter v. Morris*, 41 Hun. 575, 26 N. Y. Week. Dig. 254, 182.

²³⁸7 N. Y. S. R. 426. ²³⁹*Pfauddler Barm Extracting Bung-*

²³⁷*Stercens v. New York Elev. R. Co. ing Apparatus Co. v. Sargent*, 43

d. Minutes of former trial for use upon the trial.—Under the Code of Procedure it was held that the disbursement for a copy of the minutes of a former trial in the same action, procured for use on the second trial, could not be taxed as a “necessary” disbursement under § 311 of that Code,²⁴⁰ although there is a later case which held that they could be so taxed.²⁴¹ The present Code allows reasonable, as well as necessary, disbursements. The tendency is to hold, as reasonable, what is useful, and what prudence would suggest as a requisite in the way of the preparation, and an item for the fees of the stenographer for the minutes of a former trial of the same case has been held to be a taxable disbursement.²⁴² The contrary has been held by the second department.²⁴³

e. Minutes obtained in the trial of another action.—But where the minutes have been procured and paid for in one action, that expense cannot be taxed in another action, where the evidence thus taken was read by stipulation in the second action.²⁴⁴

f. Minutes used on motion for a new trial in the county court.—Upon a motion made for a new trial in a county court, the court ordered the minutes of the former trial for its own use. This outlay by the moving party was held not to be a taxable disbursement, because they were not taxable according to the practice of the county court where the trial was had.²⁴⁵

g. Minutes ordered by the court for its own use.—The fees

Hun, 154, 5 N. Y. S. R. 413, 25 N. Y. 24 N. Y. Civ. Proc. Rep. 402, 67 N. Y. Week. Dig. 483; *Sharer v. Eldred*, 86 S. R. 405, 33 N. Y. Supp. 583; *Kummer v. Christopher & T. Street R. Co.* Hun, 51, 66 N. Y. S. R. 783, 33 N. Y. Supp. 158; *Colton v. Simmons*, 14 12 Misc. 387, 24 N. Y. Civ. Proc. Rep. Hun, 75; *Hamilton v. Butler*, 19 Abb. 404, 67 N. Y. S. R. 404, 33 N. Y. Pr. 446, 30 How. Pr. 36, 4 Robt. 654; Supp. 581.
Spring v. Day, 44 How. Pr. 390; ²⁴³*Hudson v. Erie R. Co.* 57 App. Div. 98, 68 N. Y. Supp. 28.
Provost v. Farrell, 13 Hun, 303.

²⁴⁰*Hamilton v. Butler*, 19 Abb. Pr. 446, 30 How. Pr. 36, 4 Robt. 654; ²⁴¹*Re Metropolitan Elev. R. Co.* 46 N. Y. S. R. 138, 18 N. Y. Supp. 899.
Spring v. Day, 44 How. Pr. 390. ²⁴⁵*Whitney v. Roe*, 75 Hun, 508, 57

²⁴⁴*Flood v. Moore*, 2 Abb. N. C. 91. N. Y. S. R. 683, 27 N. Y. Supp. 511.

²⁴²*Zelmannvitz v. Manhattan R. Co.*

for the minutes of the stenographer, when furnished by the direction of the trial judge, are paid for in the first instance by the plaintiff, and if he succeeds in the action, he can tax them as a disbursement.²⁴⁶ Under § 289 of the Code of Civil Procedure, the judges of the superior city courts were empowered to order the minutes of the stenographer written out in full, and order the expense thereof to be borne equally by both parties. When these courts were abolished, this provision was repealed with all other provisions relating to those courts.

h. Power of surrogate's court to order minutes.—The surrogate courts have power upon a will contest to order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and that the expense thereof be charged against the estate.²⁴⁷ But such an order of the surrogate must be made upon notice to the proponent.²⁴⁸ And the surrogate must make the order before the contestant orders the minutes of the stenographer.²⁴⁹

i. Allowance for stenographer's minutes in the municipal court of New York.—The municipal court of New York has no power to allow a party to tax, as a disbursement, the expense of obtaining a transcript of the stenographer's minutes, furnished to the court.²⁵⁰

²⁴⁶*Johnston v. New York Elev. R. Co.* 10 Misc. 136, 62 N. Y. S. R. 491, 30 N. Y. Supp. 920. ²⁴⁹*Re Byron*, 61 Hun, 278, 40 N. Y. S. R. 845, 16 N. Y. Supp. 760.

²⁴⁷Code Civ. Proc. § 2558.

²⁵⁰*Cohen v. Weill*, 33 Misc. 764, 67 N. Y. Supp. 917.

²⁴⁸*Re Budlong*, 33 Hun, 235.

CHAPTER XXXII.

HOW COSTS ARE COLLECTED.

415. In general.

416. Motion costs.

417. By mandamus.

418. By execution against the person.

419. By proceedings to punish for contempt.

415. In general.— Where there is a judgment for money damages the costs become merged in, and a part of, the entire judgment, and are collected with it. If the judgment is discharged by bankruptcy proceedings the costs are also discharged.¹ When there are no money damages, the general costs of the action are collected by execution.

Supplementary proceedings may be maintained on a judgment for costs only, if the amount of the judgment is \$25. When the Code of Civil Procedure was first enacted, these proceedings could not be maintained upon a judgment wholly for costs. But by amendments made since that time, they are allowed upon these judgments with the limitation as to amount as above noted.²

A party may be denied the privilege of amending an interlocutory decree so as to award costs, when the party has delayed a long time without attempting to collect his costs.³

The court will correct the erroneous taxation and collection of costs upon the application of any person interested therein, although he is not a party to the action. Thus, where two attach-

¹*Clark v. Rowling*, 3 N. Y. 216, 53 43; *Re Sirrett*, 25 Misc. 89, 54 N. Y. Am. Dec. 290. Supp. 666.

²*Burke v. Burke*, 27 Misc. 684, 58 ³*Haines v. Patterson*, 87 Hun, 109, N. Y. Supp. 676; *Davis v. Herrig*, 65 67 N. Y. S. R. 459, 33 N. Y. Supp. How. Pr. 290, 8 N. Y. Civ. Proc. Rep. 814.

ment actions were brought against the same defendant, and the first attaching creditor charged more costs than he was entitled to, which left the fund too small for the second attaching creditor, the court, upon the application of the second attaching creditor, compelled the first creditor to return the excess of costs thus collected. It was further held that service of the motion papers upon the attorney for the first attaching creditor was regular, although the attorney had settled with his client.⁴

416. Motion costs.— Motion costs are also collected by execution issued against the personal property of the party required to pay the same.⁵ Where there are several defendants, and, after the death of one, the rest make a motion in the name of all, without any reference to such death, the plaintiff, if he is successful upon the motion, may issue an execution to collect his costs against all of the defendants. This execution cannot affect the estate of the deceased defendant, and the other defendants cannot complain, because they instituted the motion with that title.⁶ The party has ten days after the personal service upon him of the order, before such execution can issue,⁷ and twenty days if the service is by mail.⁸ There is no distinction between motion costs awarded in an action and in a special proceeding, as to method of collection.⁹ Supplementary proceedings may be maintained to collect motion costs awarded by the appellate division upon the decision of an appeal from an order.¹⁰

417. By mandamus.— Where a party or an attorney has been awarded costs in an action, which a town or a municipality has been directed to pay, the party to whom the costs have been awarded is entitled to a mandamus to compel the town or mu-

⁴*Goodman v. Guthman*, 2 N. Y. Week. Dig. 338.

⁵Code Civ. Proc. § 779.

⁶*Lucas v. Johnson*, 6 How. Pr. 121.

⁷Code Civ. Proc. § 779.

⁸*Wellman v. Frost*, 38 Hun, 389.

⁹*Valiente v. Bryan*, 65 How. Pr. 203, 3 N. Y. Civ. Proc. Rep. 358.

¹⁰*Re Sirrett*, 25 Misc. 89, 54 N. Y. Supp. 666.

municipality to provide for the payment of the costs thus awarded.¹¹

Where the statute provides a method for the determination of the amount of costs to be allowed to an attorney for his services, the determination of the amount in the manner provided by statute is final, and cannot be attacked collaterally, although the board which is compelled to pay the sum thus determined had no notice of such settlement.¹²

418. By execution against the person.— The plaintiff is entitled to an execution against the person for costs in an action to set aside an instrument as obtained by fraud.¹³ The defendant is entitled to an execution against the person for the collection of costs awarded to him in an action, where the plaintiff would have been entitled to one to enforce his judgment, had he been successful,¹⁴ as, in conversion,¹⁵ or for negligence.¹⁶ It makes no difference that the plaintiff recovers a small verdict, not large enough to carry costs. The defendant is still entitled to an execution to collect the balance of his costs.¹⁷ And he is entitled to this remedy, although he recovers on a mere technicality.¹⁸

¹¹*People ex rel. Crouse v. Fulton* affirmed in 64 N. Y. 625; *Miller v. County*, 70 Hun, 560, 53 N. Y. S. R. 796, 24 N. Y. Supp. 397, Affirmed in 139 N. Y. 656, 54 N. Y. S. R. 934, 35 N. E. 208; *People ex rel. Allison v. New York Bd. of Edu.* 26 App. Div. 208, 49 N. Y. Supp. 915.

¹²*People ex rel. Allison v. New York Bd. of Edu.* 26 App. Div. 208, 49 N. Y. Supp. 915.

¹³*Finkmaur v. Dempsey*, 8 N. Y. Civ. Proc. Rep. 418; *Smith v. Duff*, 37 Hun, 506, 8 N. Y. Civ. Proc. Rep. 191.

¹⁴*Brown v. Brockett*, 55 How. Pr. 32; Code Civ. Proc. § 1487; *Kloppenberger v. Neefus*, 4 Sandf. 655; *Corwin v. Freeland*, 6 N. Y. 560.

¹⁵*Catlin v. Adirondack Co.* 20 Hun, 19; *Duncan v. Katen*, 6 Hun, 1, Af-

irmed in 64 N. Y. 625; *Miller v. Scherder*, 2 N. Y. 262; *Knapp v. Murphy*, 20 App. Div. 83, 46 N. Y. Supp. 1047; *Babeock v. Smith*, 47 N. Y. S. R. 118, 19 N. Y. Supp. 817; *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65; *Carrigan v. Washburn*, 14 N. Y. Civ. Proc. Rep. 350, 17 N. Y. S. R. 850, 2 N. Y. Supp. 616; *Roerber v. Dawson*, 14 N. Y. Civ. Proc. Rep. 354.

¹⁶*Miller v. Woodhead*, 52 Hun, 127, 17 N. Y. Civ. Proc. Rep. 102, 23 N. Y. S. R. 412, 5 N. Y. Supp. 88.

¹⁷*Philbrook v. Kellogg*, 21 Hun, 238.

¹⁸*Parker v. Speer*, 17 Jones & S. 1, 16 N. Y. Week. Dig. 417, Affirming 4 Month. L. Bull. 29, 62 How. Pr.

But he is not entitled to a body execution where the plaintiff is a woman.¹⁹

A woman who employs three girls to assist her in a room rented by her is not an employee within the meaning of the consolidation act, and is not entitled to a body execution to enforce a judgment obtained by her in a municipal court of New York, for work done.²⁰

Where an execution against the person has been set aside on a motion, but upon an appeal therefrom the order is reversed, the judgment debtor cannot be again arrested under the former execution, as that is discharged, but the judgment creditor is entitled to a new process.²¹

419. By proceedings to punish for contempt.—A party cannot punish the attorney for the opposite party, as for a contempt, because he refuses to refund motion costs which the court has ordered refunded. His only remedy is by execution under § 779 of the Code of Civil Procedure.²² Nor can an attorney be compelled, by like proceedings, to pay the costs of a motion by a substituted attorney for an order compelling him to furnish entries in his register, showing what had been done in the action.²³

The fine imposed upon a trustee for his failure to obey instructions cannot include counsel fees of the moving party.²⁴ A surrogate has not the power under § 2555 of the Code of Civil Procedure to enforce the collection of costs only, by contempt

¹⁹*Parker v. Speer*, 17 Jones & S. 1, 16 N. Y. Week. Dig. 417. Affirming 4 Month. L. Bull. 29, 62 How. Pr. 394; Code Civ. Proc. § 1488.

²⁰*Berger v. Mandel*, 25 Misc. 766, 54 N. Y. Supp. 987.

²¹*Carrigan v. Washburn*, 18 N. Y. Civ. Proc. Rep. 79, 28 N. Y. S. R. 156, 9 N. Y. Supp. 541.

²²*Forstman v. Schulting*, 42 Hun, 643, 25 N. Y. Week. Dig. 293, 4 N. Y. S. R. 463.

²³*Mack v. Cohn*, 15 N. Y. Week. Dig. 136.

²⁴*Re Morris*, 45 Hun, 167, 13 N. Y. Civ. Proc. Rep. 56, 10 N. Y. S. R. 50, 27 N. Y. Week. Dig. 161; *Sudlow v. Knox*, 7 Abb. Pr. N. S. 412; *People ex rel. Wolf v. Jacobs*, 5 Hun, 428, Affirmed in 66 N. Y. S. 8; *Power v. Athens*, 19 Hun, 165, 171. *Contra*, *Van Valkenburgh v. Doolittle*, 4 Abb.

proceedings. If the decree directed the payment of a sum of money and general costs, it could undoubtedly be enforced by imprisonment.²⁵

Costs awarded in a judgment in an action for a divorce cannot be collected by proceedings to punish as for a contempt,²⁶ but alimony and counsel fees may be collected by such proceedings.²⁷

For nonpayment of the costs awarded by a final order made in a special proceeding instituted by a state writ, except where a peremptory writ of mandamus is awarded after the issuing of an alternative mandamus, the person required to pay the same may be punished for a contempt of the court awarding them, or of which the judge awarding them is a member, as if the final order was a final judgment of the court.²⁸ The court has a discretion as to the exercise of this power, and the successful party may not demand as a right that such power be exercised. The court will be guided by the facts in each case, and particularly by the ability of the defeated party to pay the costs.²⁹

The order directing that a precept issue must contain an adjudication that the accused has committed the offense charged and that the offense was calculated to, or did actually, defeat, impair, or prejudice the rights of the moving party.³⁰ The order to show cause may be served on the attorney.³¹

Where a party has been ordered to pay certain costs the nonpayment of which the court has power to punish by fine and im-

²⁵*Re Humfreville*, 154 N. Y. 115, 73 Hun, 192, 56 N. Y. S. R. 117, 25 47 N. E. 1086.

²⁶*Weill v. Weill*, 18 N. Y. Civ. Proc. Rep. 241, 10 N. Y. Supp. 627; *Jacquelin v. Jacquelin*, 36 Hun, 378, 7 N. Y. Civ. Proc. Rep. 327, 2 How. Pr. N. S. 206; *Lansing v. Lansing*, 41 How. Pr. 248, 4 Lans. 377. *Contra*, *Cockefair v. Cockefair*, 23 Abb. N. C. 219, 7 N. Y. Supp. 170.

²⁷*Flor v. Flor*, 73 App. Div. 262, 76 N. Y. Supp. 813; *Mercer v. Mercer*,

²⁸Code Civ. Proc. § 2007.

²⁹*People ex rel. Meyers v. Masonic Guild & Mut. Ben. Asso.* 22 N. Y. Civ. Proc. Rep. 74, 18 N. Y. Supp. 806.

³⁰*Mahon v. Mahon*, 18 Jones & S. 92, 5 N. Y. Civ. Proc. Rep. 58.

³¹*Pitt v. Davison*, 37 N. Y. 235; *Mahon v. Mahon*, 18 Jones & S. 92, 5 N. Y. Civ. Proc. Rep. 58.

prisonment, or either, the court, upon proof that a personal demand has been made for the same, and payment has been refused or neglected, may issue, without notice, a warrant to commit the offender to prison until the costs and the costs and expenses of the proceedings are paid, or until he is discharged according to law. Code Civ. Proc. § 2268. This summary proceeding can only be used when an execution cannot be issued to collect the costs.³²

A judgment debtor who refuses to pay costs of a supplementary proceeding may be punished for contempt of court.³³

“Whenever actions are brought by direction of the commissioners of the land office, pursuant to law, and the plaintiffs in such actions fail to recover therein, or the defendant is unable to pay the costs adjudged against him, the comptroller may audit and settle the amount of the taxable costs in such actions, and direct the payment thereof out of the treasury to the district attorneys or other persons entitled to the same.” Section 17 of Chapter 11 of the General Laws (The Public Lands Law).

³²*Re Hess*, 48 Hun, 586, 16 N. Y. S. R. 255, 1 N. Y. Supp. 811.

³³*Holton v. Robinson*, 59 App. Div. 45, 69 N. Y. Supp. 33.

FORMS.

(The numbers in the following forms refer to sections in the Code of Civil Procedure.)

Section 420.—a. Respondent's bill of costs on appeal from a judgment rendered in a justice's court, where a new trial was not had.

..... COUNTY COURT.

JOHN HEDGES
v.
GEORGE SNOW.

}

Costs by statute (§ 3067).....	\$25 00
Clerk's trial fee (§ 3301, ¶ 2).....	1 00
Clerk entering judgment (§ 3301, ¶ 3).....	50
Affidavits (§ 3298).....	.....
Sheriff's fee on execution (§ 3307, subds. 6, 10)...	62

\$.

STATE OF NEW YORK,	}
COUNTY OF,	} ss.
..... of	}

..... being duly sworn, says that he is
the attorney.. in the above-entitled action: that the items of
disbursements above mentioned are, as deponent believes, cor-
rect and true, are reasonable in amount, and have been or will

be actually and necessarily incurred in this action on the part of the, as deponent verily believes.

Sworn to before me this day
of, 19...

Taxed at \$. this day of, 19...
Clerk.

Retaxed at \$. this day of, 19...
Clerk.

- b. Appellant's bill of costs on appeal from a judgment rendered in a justice's court, where a new trial was not had upon reversal of the judgment.

(Numbers refer to sections of the Code of Civil Procedure.)

..... COUNTY COURT.

JOHN HEDGES
v.
GEORGE SNOW.

}

Costs by statute (§ 3067).....	\$30 00
Clerk's trial fee (§ 3301, ¶ 2).....	1 00
Clerk entering judgment (§ 3301, ¶ 3).....	50
Affidavits (§ 3298).....	.....
Sheriff's fee on execution (§ 3307, subds. 6, 10)...	62
Paid to perfect appeal (§ 3060).....	.....
Costs which should have been allowed appellant by justice (§ 3060) .....	.....

\$.

(Add affidavit as in form a.)

Taxed at \$. this day of , 19 . . .

. ,

Clerk.

Retaxed at \$. this day of , 19 . . .

. ,

Clerk.

- c. Bill of costs on appeal from a judgment rendered in a justice's court where a new trial was not had, and the judgment was affirmed in part only.

(Numbers refer to sections of the Code of Civil Procedure.)

. COUNTY COURT.

JOHN HEDGES

v.

GEORGE SNOW.

}

Costs as allowed by court (§ 3066, subd. 5)	1 00
Clerk's trial fee (§ 3301, ¶ 2)	50
Clerk entering judgment (§ 3301, ¶ 3)	62
Affidavits (§ 3298)	
Sheriff's fees on execution (§ 3307, subds. 6, 10)	
To be taxed by the appellant only.	
Paid to perfect appeal (§ 3060)	
Costs which should have been allowed the appellant by the justice (§ 3060)	

\$

(Add affidavit as in form a.)

Taxed at \$. this day of , 19 . . .
 ,
 Clerk.

Retaxed at \$. this day of , 19 . . .
 ,
 Clerk.

d. Bill of costs on appeal from a judgment rendered in a justice's court, where a new trial is had in the county court.

(Numbers refer to sections of the Code of Civil Procedure.)

. COUNTY COURT.

JOHN HEDGES
 v.
 GEORGE SNOW.

}
 }
 }

Costs before notice of trial (§ 3073)	\$15 00
Costs after notice and before trial (§ 3073)	10 00
Trial, issue of fact (§ 3073)	20 00
Trial, issue of law (§ 3073)	15 00
Motion for a new trial on a case (§ 3073)	15 00
Term fees (§ 3073) . . . . .	.....
Filing note of issue (§ 3307, subd. 4) . . . . .	.....
Clerk entering judgment (§ 3301, ¶ 3)	50
¹ Clerk trial fee (§ 3301, ¶ 2)	1 00
² Jurors' fees (§ 3313)	3 00
Witness fees (§ 3318) . . . . .	.....
Sheriffs' fees on execution (§ 3307, subds. 6, 10)	62
Affidavits (§ 3298) . . . . .	.....
³ Paid to perfect appeal (§ 3060) . . . . .	.....
³ Costs which should have been allowed by the justice (§ 3060) . . . . .	.....

¹To be paid and taxed by the party bringing action on.

²To be paid and taxed by the party bringing the action on.

³To be taxed by the appellant in case he succeeds.

STATE OF NEW YORK,
COUNTY OF, } ss.
 of

....., being duly sworn, says that he is, the attorney.. in this action, which action was at issue and necessarily upon the calendar for trial at the several terms held in and for the County of, at the courthouse in the city of; one commenced on the day of 19..; one commenced on the day of, 19..; that the cause was referred to Esq., and was brought to trial before at the courthouse in the city of, N. Y., on the day of 19..; that each of the persons named in Schedule A hereto annexed, and which is made a part hereof, actually attended the several trials therein named, pursuant to a subpoena, or upon special request of the, as a witness for the the number of days set opposite their respective names; that the residences of said witnesses respectively, and the distances therefrom according to the usually traveled route to the place of said trial, and the distances for which travel fees are respectively allowed, are correctly stated in said Schedule A, opposite their respective names; that each and every one of said witnesses was a necessary and material witness on the part of the, on the trial of this action. That the following witnesses named in said Schedule were not called; that the expected to prove the following facts by the said witnesses: (*state fully what was expected to be proved by the said witnesses*); that the reason why the said witnesses were not called upon the trial of the said action are: (*state fully why the witnesses were not called.*)

Sworn to before me this day
of 19...

• • • • •

STATE OF NEW YORK, }
COUNTY OF, } ss.
..... of

....., being duly sworn, says that he is
the attorney.. in the above-entitled action; that the said action
was necessarily upon the calendar for argument at the several
terms held at the city of, one commenced on the
..... day of, 19..; one commenced on the
..... day of, 19..; that the items of disburse-
ments above mentioned are, as deponent believes, correct and
true, are reasonable in amount, and have been or will be neces-
sarily incurred in this action on the part of the
as deponent verily believes.

.....
Sworn to before me this day
of19...

.....
Taxed at \$...... this day of, 19...
.....,
Clerk.

Retaxed at \$...... this day of, 19...
.....
Clerk.

e. Bill of costs taxable in an action, commenced in a court of
record, upon the entry of judgment after a verdict, report. or
decision.

(Numbers refer to sections of the Code of Civil Procedure.)

SUPREME COURT. COUNTY.

JOHN HEDGES
v.
GEORGE SNOW.

Costs taxable by the plaintiff only.

Costs before notice of trial (§ 3251, subd. 1, ¶ 1)

(\$15.00 or \$25.00)

Additional defendants served (§ 3251, subd. 1, ¶ 2) . . . . .	.....
Appointment of guardian for infant defendant (§ 3251, subd. 1, ¶ 3).....	10 00
Procuring order of publication (§ 3251, subd. 1, ¶ 4)	10 00
Procuring injunction order (§ 3251, subd. 1, ¶ 5).....	10 00
Procuring order of arrest (§ 3251, subd. 1, ¶ 5) ..	10 00
Allowance as a matter of right in attachment, mortgage foreclosure, partition, adjudication of will, or other instrument in writing, to compel determination of a claim to real property (§ 3252) ..	.....

Costs taxable by the defendant only.

Costs before notice of trial.....	\$10 00
Allowance to defendant (§ 3258).....	.....

Costs taxable by either party.

Costs after notice and before trial (§ 3251, subd. 3, ¶ 1)	\$15 00
Trial fee issue of law (§ 3251, subd. 3, ¶ 4).....	20 00
Trial fee issue of fact (§ 3251, subd. 3, ¶ 5).....	30 00
Trial fee more than two days (§ 3251, subd. 3, ¶ 5)	10 00
Allowance by court (§ 3253).....	.....
Costs of motions (§ 3251, subd. 3, ¶ 9).....	.....
New trial pursuant to an order (§ 3251, subd. 3, ¶ 10)	25 00
Taking deposition of witness (§ 3251, subd. 3, ¶ 2).....	10 00
Drawing interrogatories (§ 3251, subd. 3, ¶ 3)...	10 00
Term fees (§ 3251, subd. 3, ¶ 11).....	.....

DISBURSEMENTS (general authority, § 3256).

Taxable by the plaintiff only.

Serving summons and complaint (§ 3307, subd. 1).....	.....
Publication of summons (§ 3256).....	.....
Filing and recording <i>lis pendens</i> (§ 3304, ¶ 6)...	.....

Taxable by either party.

Referee's fees (§§ 3256, 3296).....	.....
Commissioner's fees (§ 3256) . . . . .	.....

Sheriff's calendar fee (§ 3307, subd. 4).....	.....
Clerk's trial fee (§ 3301, ¶ 2).....	1 00
Clerk's minutes of trial (§ 3301, ¶ 5).....	.....
Clerk's fee, entry of judgment (§ 3301, ¶ 3).....	.....
Commissioner in partition or dower (§§ 3256, 3299) . . . . .	.....
Paid for searches (§ 3256) . . . . .	.....
Surveyor in partition or dower (§§ 3256, 3299) ..	.....
Paid for affidavits (§ 3298).....	.....
Certified copies of orders (§ 3301, ¶ 5).....	.....
Transcript and docketing in another county (§ 3301, ¶¶ 7, 8)	18
Sheriff's fees on execution to another county	
Sheriff's fees on execution (§ 3307, subds. 6, 10) ..	62
(§ 3307, subds. 6, 10.)	62
Jurors' fees (§ 3313)	3 00
Witness fees (§ 3318) . . . . .	.....
Postage incurred and to be incurred (§ 3256)....	.....

If further proceedings are had after verdict, report, or decision, before entry of judgment, add proper costs from form f.

(*Add affidavits as in form d.*)

Taxed at \$. this day of, 19...

.....,

Clerk.

Retaxed at \$. this day of, 19...

.....,

Clerk.

f. Costs incurred after trial and before appeal.

(Numbers refer to sections of the Code of Civil Procedure.)

SUPREME COURT, COUNTY.

JOHN HEDGES

v.

GEORGE SNOW.

}
}
}

Motion for new trial without a case (§ 3251,
subd. 3, ¶ 9)

\$10 00

Motion for a new trial upon a case before argument (§ 3251, subd. 3, ¶ 8; subd. 4, ¶ 2).....	20 00
Motion for a new trial upon a case, for argument (§ 3251, subd. 3, ¶ 8; subd. 4, ¶ 3).....	40 00
Making and serving case not exceeding 50 folios (§ 3251, subd. 3, ¶ 6).....	20 00
Making and serving case exceeding 50 folios (§ 3251, subd. 3, ¶ 6).....	30 00
Making and serving amendments to case (§ 3251, subd. 3, ¶ 7)	20 00
Application for judgment upon a special verdict, before argument (§ 3251, subd. 3, ¶ 8; subd. 4, ¶ 2)	20 00
Application for judgment upon a special verdict, for argument (§ 3251, subd. 3, ¶ 8; subd. 4, ¶ 3)	40 00
Application to appellate division for new trial, be- fore argument (§ 3251, subd. 4, ¶¶ 1, 2).....	20 00
Application to appellate division for new trial, for argument (§ 3251, subd. 4, ¶¶ 1, 3).....	40 00
Application for judgment rendered subject to opin- ion of the court before argument (§ 3251, subd. 4, ¶¶ 1, 2)	20 00
Application for judgment upon verdict rendered subject to opinion of court, for argument (§ 3251, subd. 4, ¶¶ 1, 3).....	40 00
Exceptions ordered heard at appellate division in first instance before argument (§ 3251, subd. 4, ¶¶ 1, 2)	20 00
Exceptions ordered heard at appellate division in first instance for argument (§ 3251, subd. 4, ¶¶ 1, 3)	40 00
Term fees (§ 3251, subd. 4, ¶ 4).....	.....

DISBURSEMENTS.

Clerk's fee on argument (<i>see note below</i>).....	.....
Clerk's fee for remittitur (<i>see note below</i>).....	.....
Clerk's fee, entry of judgment (§ 3301, ¶ 3).....	50
Paid for affidavits (§ 3298).....	.....

Transcript and docketing in another county	
(§ 3301, ¶¶ 7, 8).....	18
Sheriff's fees on execution (§ 3307, subds. 6, 10)...	62
Sheriff's fees on execution in another county	
(§ 3307, subds. 6, 10).....	62
Postage incurred and to be incurred (§ 3256).....	
Printing case (§ 3256).....	
Printing points (§ 3256).....	
Stenographer's fees, copy (§ 3311).....	
STATE OF NEW YORK,	
COUNTY OF,	} ss.
..... of	}

....., being duly sworn, says that he is,
the attorney.. in the above-entitled action; that
the items of disbursements above mentioned are, as deponent be-
lieves, correct and true, are reasonable in amount, and have
been or will be actually and necessarily incurred in this action
on the part of the, as deponent verily believes;
that the copies of documents and papers for certified copies, of
which charges are herein made, were actually and necessarily
used (or were necessarily obtained for use); that the cause was
necessarily on the calendar the terms above named.

Sworn to before me this day
of, 19...

Taxed at \$. this day of, 19...
.....,
Clerk.

Retaxed at \$. this day of, 19...
.....,
Clerk.

NOTE.—There is no authority for the charging of any fee by the clerk of the appellate division. In the old general term, fees were charged for various services, and in the present appellate divisions that custom has been continued in some and discontinued in others.

Section 1355 of the Code of Civil Procedure refers to the fees of the clerk of the appellate division, but there is no statute

which gives them any fees outside of §§ 3301, 3304, and 3306. Authority is sought in § 3301, which is a re-enactment of § 312 of the Code of Procedure, under which fees were charged by the clerks of the old general term. Section 3301 refers to services rendered by the clerk of a trial court, because there are many services therein enumerated which cannot be performed by a clerk of the appellate division; and the charge for argument fee is arrived at only by a very strained construction, and by relying upon the construction of § 252 of the Code of Procedure (*Wilcox v. Curtiss*, 10 How. Pr. 91, Chenango special term 1854; Clerk's Fees, 5 How. Pr. 11, general term 1850). That section defined a trial as a judicial examination of the issues between the parties. It was therefore argued that the issues between the parties were examined at general term upon appeal, just as much as at the circuit. The Code of Civil Procedure omits that section, and by § 976 it regulates the trial of an issue of law and of fact before one judge. There is a plain distinction, all through the Code of Civil Procedure, between a trial and an appeal.

A charge is made in some of the appellate divisions for the fees of the clerk. In others no charge is made. In the fourth department when § 221 of the Code of Civil Procedure was amended so that a deputy clerk could be appointed, an amendment was also added which provided that the clerk of that department should make no charge for his fees, and further provided that his disbursements should be paid in the same manner as his salary.

g. Costs incurred on appeal to the appellate division.

(Numbers refer to sections of the Code of Civil Procedure.)

SUPREME COURT, COUNTY.

JOHN HEDGES
v.
GEORGE SNOW.

}
}
}

Making and serving case not exceeding 50 folios

(§ 3251, subd. 3, ¶ 6)..... \$20 00

Making and serving case exceeding 50 folios (§ 3251, subd. 3, ¶ 6)	30 00
Making and serving amendments to case (§ 3251, subd. 3, ¶ 7)	20 00
Costs before argument (§ 3251, subd. 4, ¶¶ 1, 2) ..	20 00
Costs for argument (§ 3251, subd. 4, ¶¶ 1, 3)	40 00
Term fees (§ 3251, subd. 4, ¶ 4) .....	.....
Appeal from interlocutory judgment or order of the city court of New York (§ 3251, subd. 4, ¶ 4, § 3189)	10 00

DISBURSEMENTS.

Clerk's fee on argument (<i>see note to form f</i>) .....	.....
Clerk's fee for remittitur (<i>see note to form f</i>) .....	.....
Clerk's fee, entry of judgment (§ 3301, ¶ 3)	\$0 50
Paid for affidavits (§ 3298) .....	.....
Transcript and docketing in another county (§ 3301, ¶¶ 7, 8)	18
Sheriff's fees on execution (§ 3307, subds. 6, 10) ..	62
Sheriff's fees on execution in another county (§ 3307, subds. 6, 10)	62
Postage incurred and to be incurred (§ 3256) .....	.....
Printing case (§ 3256) .....	.....
Printing points (§ 3256) .....	.....
Stenographer's fees, copy (§ 3311) .....	.....

(Add affidavits as in form f.)

Taxed at \$. this day of, 19 . . .
 ,
 Clerk.

Retaxed at \$. this day of, 19 . . .
 ,
 Clerk.

h. Costs incurred on appeal to the court of appeals.

(Numbers refer to sections of the Code of Civil Procedure.)

SUPREME COURT, COUNTY.

JOHN HEDGES

v.

GEORGE SNOW.

Costs before argument (§ 3251, subd. 5, ¶ 1)....	\$30 00
Costs for argument (§ 3251, subd. 5, ¶ 2).....	60 00
Term fees (§ 3251, subd. 5, ¶ 3).....	.....
Damages for delay (§ 3251, subd. 5, ¶ 4).....	.....

DISBURSEMENTS.

Filing notice of appeal (§ 3300, ¶ 2).....	\$0 50
Paid for remittitur (§ 3300).....	.....
Clerk for certificate of judgment, etc. (§ 3301, ¶ 6) . . . . .	.....
Paid for printing case (§ 3256).....	.....
Paid for printing points (§ 3256).....	.....
Postage (§ 3256) . . . . .	.....

(Add affidavits as in form f.)

Taxed at \$. this day of 19...

Clerk.

Retaxed at \$. this day of, 19...

Clerk.

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